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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 05/08/87

CASE NBR 86-1-01475 CSX
SHORT TITLE Burlington N. RR Co. DOCKETED: Mar 13 1987
VERSUS Bell, Charles, et al.

Date	Proceedings and Orders
Feb 5 1987	Application for a further extension of time to file petition and order granting same until March 13, 1987 (White, February 9, 1987).
Mar 13 1987	Petition for writ of certiorari filed.
Apr 7 1987	Order, extending time to file response to petition until May 6, 1987.
May 6 1987	DISTRIBUTED. May 21, 1987
May 7 1987	Brief of respondents Charles Bell, et al. in opposition filed.
May 18 1987	Reply brief of petitioner Burlington N. RR Co. filed.
May 26 1987	REDISTRIBUTED. May 28, 1987
Jun 1 1987	REDISTRIBUTED. June 4, 1987
Jun 8 1987	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

86 1475

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

CHARLES O. BELL, JR. and TANK TRUCKS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

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March 13, 1987

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QUESTION PRESENTED

Where a state court, in contravention of 28 U.S.C. § 1446, conducts proceedings after a timely petition for removal to federal court and before an order of remand, are those interim proceedings void as a matter of federal law?

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Burlington Northern Railroad Company:

- The Belt Railway Company of Chicago
- Burlington Northern Dock Corporation
- Burlington Northern (Manitoba) Limited
- Burlington Northern Railroad Properties, Inc.
- Camas Prairie Railroad Company
- Clarkland Royalty, Inc.
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railway Company
- Paducah & Illinois Railroad Company
- Portland Terminal Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis
- Trailer Train Company
- Western Fruit Express Company
- The Wichita Union Terminal Railway Company
- Winnona Bridge Railway Company
- Northern Radio Ltd.

BN Financial Services Inc.

BN Geothermal Inc.

BN Leasing Inc.

Burlington Northern Foundation

Burlington Northern International Services Inc.
- Burlington Northern Trading Company Inc.

Burlington Northern Motor Carriers Inc.
- BNMC Leasing Inc.

Burlington Northern Overseas Finance Company N.V.

Colt Intermodal Inc.

Glacier Park Company
- Dreyer Bros., Inc.
- Glacier Arizona Company
- Glacier Park Boulder Company
- Glacier Park Denver Company
- Glacier Park Orillia Company I
- Glacier Park Riverpoint Company
- Heritage Glacier Park Company
- Kalispell Glacier Park Company
- Tennessee Glacier Park Company

Glacier Park Liquidating Company

Meridian Minerals Company
- Granite Falls Rock
- Meridian Aggregates Company
- Saxony Corporation

M-R Holdings Inc.

M-R Holdings Acquisition Company

M-R Holdings Inc. No. 1 (Through No. 7)
- Southland Royalty Company
  - Southland Gathering Company
  - Southland Pipeline Company
  - SRC Production Company
    - SRC Realty Company

National Exchange, Inc.
- National Exchange Satellite, Inc.

New Mexico and Arizona Land Company
- NZ Development Corporation
- NZ Properties, Inc.

Plum Creek Timber Company, Inc.
- Plum Creek Foreign Sales Corporation

Research Applications Inc.

The El Paso Company
- El Paso Natural Gas Company
  - BEM Holding Corporation
  - El Paso Del Peru Company
  - El Paso Development Company
    - Ex-Mission Ranches, Inc.
    - Windjammer, Inc.
  - El Paso Gas Marketing Co.
  - El Paso Hydrocarbons Company
    - El Paso Frontera Corporation
    - El Paso Gas Transportation Company
    - El Paso Hydrocarbons Gas Processing Company
    - El Paso Hydrocarbons NGL Company
    - El Paso Hydrocarbons Pipeline Company
    - El Paso Hydrocarbons Service Company
    - El Paso Hydrocarbons Transportation Company
    - El Paso Storage Company
      - West Lake Natural Gasoline Company
    - Odessa Natural Gasoline Co.
    - Odessa Pipeline Company
    - Pecos Company
    - Trebol Drilling Company
  - El Paso Mojave Pipeline Co.
  - El Paso Natural Gas Building Company
  - El Paso Natural Gas Clearinghouse Company
  - El Paso Production Company

Meridian Oil Holding Inc.
- Meridian Oil Inc.
  - Butte Pipe Line Company
  - Meridian Oil Pipeline Company
  - Meridian Oil Trading Inc.
  - Northern Rockies Pipe Line Co.
  - Portal Pipe Line Company
- Meridian Oil Production Inc.
  - EPX Company
- Meridian Oil Services Inc.

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OCTOBER TERM, 1986

No. ——

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Petitioner,

v.

CHARLES O. BELL, JR. and TANK TRUCKS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

Petitioner Burlington Northern Railroad Company respectfully prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of Oklahoma entered in this case on November 19, 1986.

OPINIONS BELOW

The unreported order of the Supreme Court of the State of Oklahoma, denying the petition of Burlington Northern Railroad Company for review of the decision of the Court of Appeals of the State of Oklahoma, appears in the Appendix at 17a. The order and judgment of the Court of Appeals of the State of Oklahoma, published at 57 O.B.J. 1427, appears in the Appendix at 1a to 16a. The unreported judgment of the District Court

of Creek County, Oklahoma, appears in the Appendix at 18a to 21a.

JURISDICTION

The order of the Supreme Court of the State of Oklahoma was entered on November 19, 1986. By order of February 9, 1987, this Court extended until March 13, 1987, the time within which petitioner was permitted to file a petition for a writ of certiorari. Pet. App. 48a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

STATUTORY PROVISIONS INVOLVED

The statute governing the procedure for removal of an action from state to federal court, 28 U.S.C. § 1446 (1982) (hereinafter "section 1446"), is set forth in the Appendix at 22a to 24a. Most pertinent for purposes of this litigation is section 1446(e), which provides:

> Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

Section 1446 was first enacted by the Act of June 25, 1948, ch. 646, 62 Stat. 939. Minor amendments were effected by the Act of May 24, 1949, ch. 139, § 83, 63 Stat. 101. Revisions concerning the removal of a criminal, but not a civil, case were enacted by the Act of July 30, 1977, Pub. L. 95-78, § 3, 91 Stat. 321.

STATEMENT OF THE CASE

This case concerns the interpretation of the federal removal statute, 28 U.S.C. § 1446(e), which provides that after the perfection of a timely removal petition and notice to the state court, "the State court shall proceed no further unless and until the case is remanded." In

this case, the state court, in contravention of 28 U.S.C. § 1446(e), proceeded to verdicts during the period after a timely petition for removal and before remand by the federal court. The question presented is whether, in light of the explicit command of section 1446(e) and the need for clarity and precision in the administration of the federal removal statute, such interim state proceedings must be held void as a matter of federal law.

The underlying negligence action arose out of a collision in August, 1981 between a truck driven by Charles O. Bell, Jr., for his employer, Tank Trucks, Inc., and a railroad engine operated by Burlington Northern Railroad Co. Plaintiffs Bell and Tank Trucks, residents of Oklahoma, named as defendants in a state court action both Burlington Northern and the individual who had been the conductor on its engine, Sam Scully. Burlington Northern was a Delaware corporation having its principal place of business in St. Paul, Minnesota; it was not a resident of Oklahoma, and was therefore a diverse party. Burlington Northern's employee, Scully, however, was a resident of Oklahoma. His presence in the case broke the complete diversity that otherwise would have obtained. Plaintiffs sought well in excess of $10,000, exclusive of interest and costs.

On the morning of June 21, 1983, during a jury trial of approximately one week, the parties rested on their respective evidence. At this point, the trial court sustained the demurrer of the resident, nondiverse defendant, Scully, and dismissed him from the case. Burlington Northern thereupon requested an instruction that the conductor's negligence could not be considered by the jury as evidence of the Railroad's liability. Pet. App. 43a-46a. No such instruction was agreed upon at the time, or was ever given.

In this state of affairs, with Burlington Northern, a nonresident of Oklahoma and a diverse party, left as the sole defendant, the trial court recessed for lunch. During

the noon break, Burlington Northern exercised its statutory right, based on diversity of citizenship and amount in controversy, to petition for removal of the case to federal court. The removal petition was founded on Burlington Northern's understanding, derived from the state trial court record, that the resident co-defendant had been voluntarily dismissed from the case.[1] Under such circumstances, sections 1441(b) and 1446(b) of the Judicial Code authorize removal during trial.[2]

Burlington Northern took the required procedural steps for removal on a timely basis: filing of a removal petition and adequate bond with the federal district court for the Northern District of Oklahoma, provision of written notice to plaintiffs, and filing of a copy of the removal petition with the Oklahoma trial court.[3]

When the Oklahoma trial court reconvened after the lunch break, counsel for Burlington Northern appeared in open court to notify the judge that the case had been removed to federal court, and that the state court had therefore been divested of jurisdiction to proceed. Pet.

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[1] In response to the question, "You did not object to the demurrer being sustained?" plaintiff's counsel stated "That's correct." Pet. App. 45a. Counsel stated further: "We announced to the Court we had no objection to the demurrer being sustained." Pet. App. 45a. One more time, plaintiff's counsel observed that "I told the Court at one point and I think [my co-counsel] did, that we had no objection to the demurrer being sustained." Pet. App. 45a-46a. Such was the record when Burlington Northern removed the case to federal court.

[2] Under this Court's decisions, a case brought in state court, not initially removable upon the pleadings, may be removed later if the plaintiff *voluntarily* brings about a change that renders the case removable. *See, e.g., Lathrop, Shea & Henwood Co. v. Interior Constr. & Improvement Co.*, 215 U.S. 246 (1909); *Kansas City Suburban Belt Ry. v. Herman*, 187 U.S. 63 (1902). *See infra* note 4.

[3] For evidence of strict compliance with respect to each of these procedural requirements, see Pet. App. 25a-33a. *See* § 1446(a), (b) & (c).

App. 46a-47a. Despite defense counsel's repeated statements notifying the state court of the removal, the judge directed counsel to make closing arguments to the jury. Pet. App. 47a. Counsel for Burlington Northern complied with this order, and the closing arguments were made. The jury was then sent out to deliberate, and returned a verdict later that same day finding plaintiff Bell twenty percent at fault and Burlington Northern eighty percent at fault, and assessing damages. Accordingly, the money verdicts against Burlington Northern were set at $872,481.60 in favor of Bell and $27,200 in favor of Tank Trucks.[4]

Plaintiffs moved for a new trial against defendant Scully. On July 20, 1983, plaintiffs also moved the federal district court to remand the case to the Oklahoma trial court. While its removal petition was pending, Burlington Northern moved the federal court to vacate the post-removal proceedings and verdicts in the state court. On March 27, 1984—about nine months after the date of the removal and completion of the state court trial—the federal district court remanded the case, without voiding the interim state court proceedings. In remanding the

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[4] The rationale for permitting removal after the voluntary dismissal of a resident defendant is well illustrated by the course of the trial below. Before trial, Burlington Northern was prevented from removing the case by the presence of the resident individual defendant, Scully. Scully was dismissed from the case just before its submission to the jury, so that plaintiff's counsel were spared the task of seeking substantial monetary damages against a resident individual from a resident jury. However, Burlington Northern did not receive the benefit of a jury instruction that Scully's alleged negligence could not be considered against the Railroad —an instruction that would flow naturally from any finding that the dismissal was "involuntary," *i.e.*, with prejudice. Thus, in this case, plaintiffs had the best of all worlds—a trial concluded in state court, with no risk of a monetary verdict against a resident individual, and with evidence concerning the negligence of the resident individual permitted to be considered by the jury as it deliberated over the liability of the nonresident defendant.

case, the federal court cited its lingering doubts as to whether the dismissal of Scully had actually been voluntary, which would have entitled Burlington Northern to removal, or involuntary, which would have provided no proper occasion for removal. Pet. App. 36a, 40a; *see supra*, note 2. The decision of the federal district court, although it was adverse to Burlington Northern, demonstrated that the issue of removability had been a substantial one.[5]

On June 26, 1984—without having conducted a new trial—the Oklahoma trial court entered its judgment against Burlington Northern, in the amount of the jury verdicts rendered while the case was in the federal court, plus applicable interest. Pet. App. 18a-21a.

On July 25, 1984, Burlington Northern appealed the Oklahoma judgment to the Supreme Court of the State of Oklahoma, which referred the appeal to the Oklahoma Court of Appeals, Division 4.[6] On appeal, Burlington Northern contended, *inter alia*, that the Oklahoma trial court proceedings held after removal and before remand were void for want of jurisdiction. In support of this contention, the Railroad relied both on the plain language of section 1446(e), and on a considerable body of precedent interpreting the statute to require a state court, after a case has been removed, to cease its proceedings unless and until the case is remanded.

On August 5, 1986, the Oklahoma Court of Appeals denied Burlington Northern's appeal and affirmed the judgment. The Court of Appeals concluded that section

[5] In a civil case removed on grounds of diversity and later remanded, the remand order is unreviewable within the federal court system. 28 U.S.C. § 1447(d) (1982).

[6] Under Oklahoma appellate procedure, appeal from a state trial court is perfected by filing of a petition in error to the Supreme Court of the state, which may then decide the appeal itself or refer it to the state Court of Appeals. Okla. Stat. Ann. tit. 20, § 30.1 (West Supp. 1987).

1446(e), like the predecessor removal statutes in effect up until 1948, allows the state court to proceed at its peril after removal: if the case is held removable, any state court proceedings after removal are void, but if the case is ultimately remanded, the interim proceedings are not void. Pet. App. 7a-10a. For this proposition, the Court of Appeals cited several cases, most prominently a Florida decision, *Wilson v. Sandstrom*, 317 So.2d 732 (Fla. 1975), *cert. denied*, 423 U.S. 1053 (1976). In addition, relying on a 1952 decision of the Oklahoma Supreme Court, the Oklahoma Court of Appeals reasoned that the federal removal "statute does not contemplate removal after trial has commenced" in state court. Pet. App. 11a-12a. Finally, the Court of Appeals stated that the federal court "never acquired jurisdiction" of the case, because the case was ultimately remanded. Pet. App. 13a.

From the Oklahoma Court of Appeals' decision, Burlington Northern timely petitioned for certiorari to the Supreme Court of Oklahoma. On November 19, 1986, that petition for certiorari was denied by a vote of five to four. Pet. App. 17a.

REASONS FOR GRANTING THE WRIT

When a party removes a case from state to federal court, it is essential that both the litigants and the courts involved be able to determine with absolute certainty the forum in which the case may proceed. Without that certainty, duplication of judicial effort is likely to result, and the parties may be subjected to jurisdiction where none properly exists. Furthermore, the sound national policies that divide authority between state and federal courts, including the policies undergirding diversity jurisdiction, are seriously compromised when doubts exist as to the effectiveness of a removal.

The courts of Oklahoma have introduced uncertainty where existing law was previously well settled, and the

decisions below create a risk that they will be followed in other jurisdictions. Almost every federal or state court that has directly addressed the question has concluded that any state court proceedings conducted in the interim between removal and remand, and therefore in contravention of section 1446(e), are absolutely void. This interpretation accords with the plain language of the federal removal statute, and with the intent of the Congress that revised the statute nearly forty years ago. Because the decisions below concern an important issue of federal law, and because they depart sharply from sound precedent in an area where a clear rule is essential, review and reversal by this Court are required.

I. THE DECISIONS BELOW ARE IN DIRECT CONFLICT WITH NEAR UNANIMOUS AUTHORITY GOVERNING THE EFFECT OF REMOVAL OF A CASE FROM STATE TO FEDERAL COURT

In this case, the courts of Oklahoma have decided—despite the state trial court's lack of authority to proceed once the case had been removed—that the proceedings conducted by the state court while the case was pending in federal court are valid and enforceable. In effect, the courts below have concluded that the subsequent remand "resuscitated" the moribund trial proceedings and verdicts in the state trial court. This construction of section 1446(e) is utterly opposed to well reasoned judicial authority concerning the effect of a removal, and directly at odds with the underlying logic of the present statutory scheme.

Section 1446 of the Judicial Code governs the procedure for removal of both criminal and civil cases from state to federal court. The same removal procedures apply whatever the basis for removal—whether it be the presence of a federal claim, the existence of diversity of citizenship and a controversy over more than $10,000, the naming of a federal officer as defendant, or the denial

of federally guaranteed civil rights. 28 U.S.C. §§ 1441-1451 (1982). The procedure for removal of a civil case is straightforward. First, when a case is filed or later becomes removable, the defendant files with the appropriate federal district court a verified petition of removal, together with an adequate bond. § 1446(a), (b), (d). In addition, the defendant must promptly give written notice to all adverse parties and file a copy of the federal court petition with the state court, which must then "effect" the removal. § 1446(e).

Once these steps have been completed, jurisdiction over the case lies in the federal district court. Accordingly, the statute is absolutely explict as to what the state court may do, unless and until the case is remanded: nothing. The last sentence of section 1446(e) states unmistakably that "the State court shall proceed no further." In effect, the state court loses its jurisdiction until such time, if ever, as the federal district court determines that the case was improvidently removed. This principle is amplified by the companion statutory provision to section 1446, which provides that once the federal district court has remanded a case, "[t]he State court *may thereupon proceed* with such case." 28 U.S.C. § 1447(c) (emphasis added).[7]

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[7] Further amplification is provided by 28 U.S.C. § 1450 (1982), which states as follows: "All injunctions, orders, and other proceedings had in [a state court] action *prior to its removal* shall remain in full force and effect until dissolved or modified by the district court." (Emphasis added).

The arresting effect of removal of a civil case on the state court's jurisdiction is brought into sharper relief by comparison to removal of a criminal prosecution to federal court. § 1446(c) (as amended by Pub. L. No. 95-778, 91 Stat. 321 (1977)). In a criminal case, the statute clearly provides that the state court entertaining the prosecution may proceed in its own discretion after the removal petition has been filed, except that it may not enter judgment unless and until the case is remanded. § 1446(c)(3). Once notified that the federal district court has granted the petition for removal in a criminal case, however, the state court is absolutely barred from

Under the predecessor removal statutes in effect up until 1948, after a case was removed to federal court, the state court could "proceed at its peril." That is, if the removal were upheld, subsequent state court proceedings were void; yet if the case were ultimately remanded, the interim proceedings were found to be valid. *See Metropolitan Casualty Insurance Co. v. Stevens*, 312 U.S. 563 (1941); *Yankaus v. Feltenstein*, 244 U.S. 127 (1917); *Virginia v. Rives*, 100 U.S. 313 (1879). This is essentially the approach adopted by the courts below. What the Oklahoma courts failed to recognize, however, is that in 1948, Congress revised and simplified the removal procedures.[8] One effect of these revisions was to revoke the authority of the state court to proceed at its peril after a removal.

The effect of the 1948 statute on state court proceedings between removal and remand was analyzed in depth in the leading case, *South Carolina v. Moore*, 447 F.2d 1067, 1072-74 (4th Cir. 1971). In *Moore*, the Fourth Circuit held that the conviction of a criminal defendant who was tried between the filing of his removal petition and a subsequent remand by the federal court was void.[9] As the *Moore* court observed, this result was mandated by the elimination in 1948 of the procedural premises of the *Rives-Metropolitan* rule. *Id.*

Under the pre-1948 procedure, the petition for removal was filed with the *state* court; furthermore, the simple filing of the petition was insufficient to perfect removal,

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proceeding further. § 1446(c)(5). Any state court proceedings continuing a prosecution after that time would, of course, be void as a matter of federal law.

[8] *See, e.g.*, H.R. Rep. No. 2646, 79th Cong., 2d Sess. 6 (1946).

[9] From 1948 to 1977, the same statutory procedures controlled removal of civil and criminal cases from state to federal court. *See supra* at 2-3, n.7. Therefore, criminal cases such as *Moore* arising during that period constitute valid precedent for § 1446(e) today.

and some judicial action was required effectively to remove the case. *See* 28 U.S.C. §§ 72, 74-76 (1940). This led to the conclusion, expressed by this Court in *Metropolitan* and *Rives*, that if the facts stated in the petition were inadequate to support removal, then the state court should be permitted to ignore the petition, and its further proceedings were not void in the event that the case were later remanded. *See Metropolitan*, 312 U.S. at 566; *Rives*, 100 U.S. at 321-22.

As enacted in 1948, the present removal statute: (1) designates the *federal* court, rather than the state court, as the appropriate forum for deciding the removal petition; and (2) makes it clear that the execution of a series of defined procedural tasks is sufficient to perfect removal, without any need for substantive judicial action. § 1446(a), (b), (d), (e). Under the current system, then, the federal district court is accorded controlling authority with respect to removal, and there is a bright-line procedural format for measuring whether a case has been removed. Thus, it would be wholly inconsistent with the present statutory scheme to provide the state court with discretion to proceed after removal. Whereas before 1948, the state court was well situated to evaluate removability and to balance the risks of conducting duplicative proceedings against the benefits of continuing its proceedings after a removal, that is no longer the case. Such a practical comparison of the old and new statutory procedures led the *Moore* court to conclude that Congress had "effectively reversed the premise underlying the *Rives-Metropolitan* rule." 447 F.2d at 1073.

Virtually every state and federal court that has directly confronted the question has concluded that state court proceedings after removal but before remand are void. In perhaps the first decision on this point under revised section 1446(e), the Supreme Court of Idaho vacated a civil default judgment entered by the state

trial court in the interim between removal and remand. *Hopson v. North American Insurance Co.*, 71 Idaho 461, 233 P.2d 799, 802 (1951).[10] Similarly, the Supreme Court of Rhode Island set aside lower state court orders relating to real estate under contest in a domestic dispute, when those orders were entered between removal and remand of the case by the federal court. *Cavanagh v. Cavanagh*, 119 R.I. 479, 380 A.2d 964 (1977). In another case, *Mississippi Power Co. v. Luter*, 336 So. 2d 753 (Miss. 1976), the Supreme Court of Mississippi reversed a judgment against a civil defendant solely because the jury was impanelled between the removal and later remand, even though the case was tried *after* the remand.

A battery of other decisions agree that *any* state court proceedings after removal, but before remand, are absolutely void.[11] This principle applies with equal force even

[10] The *Hopson* court based its decision on much the same analysis as was later adopted in *Moore*, observing that because in 1948 "Congress has . . . expressly effected the removal of the cause to the Federal Court irrespective of the ultimate determination of the question as to whether or not it is removable; it is not thereafter in the State court for any purpose until and unless the cause is remanded . . . ." 233 P.2d at 802.

[11] For state court decisions, *see, e.g., Laguna Village, Inc. v. Laborers Int'l Union*, 35 Cal. 3d 174, 197 Cal. Rptr. 99, 672 P.2d 882, 885 (1983) (citations omitted); *City of Lake Charles v. Bell*, 347 So. 2d 494 (La. 1977) (criminal case: contempt orders entered between removal and remand held void); *People v. Wynn*, 73 Mich. App. 713, 253 N.W.2d 123 (1977) (criminal case voiding state court trial conducted while removal petition was pending in federal court); *Davis v. Davis*, 267 S.C. 508, 229 S.E.2d 847 (1976) (voiding orders issued by state court subsequent to removal to federal court); *State ex rel. Lyons v. Lake Superior Court*, 259 Ind. 217, 285 N.E.2d 642 (Ind. 1972); *Fossey v. State*, 254 Ind. 173, 258 N.E.2d 616 (1970) (criminal case voiding proceedings in state trial court while a removal petition was pending in federal court); *Crown Constr. Co. v. Newfoundland Am. Ins. Co.*, 429 Pa. 119, 239 A.2d 452 (1968) (dicta).

For federal decisions, *see, e.g., Syntex Ophthalmics, Inc. v. Novicky*, 745 F.2d 1423 (Fed. Cir. 1984) (dicta), *cert. granted*

when the removal is taken after a trial has begun.[12] Furthermore, the federal court's ultimate decision as to the substantive "removability" of a case is immaterial to the voidness of interim proceedings, so long as removal to the federal court was perfected by taking the required procedural actions.[13] Respected commentaries have echoed the judicial consensus on these points. *See* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3737 at 551-52 (2d ed. 1985); 1A J. Moore & B. Ringle, *Federal Practice* § 0.168[3.-8-4] at 631-32 (1986); 38 A.L.R. Fed. 824, 870-71 (1978).

The cases relied upon by the Oklahoma courts provide little authority for their decisions. In the case given the greatest prominence below, *Wilson v. Sandstrom*, 317 So. 2d 732 (Fla. 1975), *cert. denied*, 423 U.S. 1053

and judgment vacated on other grounds, 470 U.S. 1047 (1985); *Murray v. Ford Motor Co.*, 770 F.2d 461 (5th Cir. 1985) (after state court received notice of removal to federal court, state court is powerless to set aside default judgment entered before removal); *Parker v. Brown*, 570 F. Supp. 640 (S.D. Ohio 1983) (state court action setting aside prior order permitting United States to intervene was null and void, since entered after case was removed to federal court); *Heniford v. American Motors Sales Corp.*, 471 F. Supp. 328 (D.S.C. 1979) (once removal to federal court is effected, state court jurisdiction ends and any further action in state court is void), *dismissed mem.*, 622 F.2d 584 (4th Cir. 1980); *Master Equip. Inc. v. Home Ins. Co.*, 342 F. Supp. 549 (E.D. Pa. 1972) (entry of a default judgment by a state court after case was removed to a federal court was a nullity).

[12] *See, e.g., Heniford, supra*, 471 F. Supp. 328 (removal from state court to federal court perfected during jury deliberations, just prior to jury verdict; thus jury verdict and further proceedings in state court were a nullity); *Kaplan v. Missouri Pacific R.R.*, 447 So. 2d 489 (La. Ct. App. 1984) (dicta) (where state court trial is in progress and removal petition is filed in federal court, state court jurisdiction terminates when requisites of federal removal statute are met), *cert. denied*, 449 So. 2d 1345 (La. 1984).

[13] *See* cases cited *supra* 11-13 & n.11 (state appellate decisions taken subsequent to a remand).

(1976), the Florida Supreme Court did appear to revive the "proceed at peril" rule of the pre-1948 statutes. That case, however, may be viewed to stand on the independent factual ground that the order under challenge was actually issued after remand of the case from federal court.[14] Likewise, in *Doerr v. Warner*, 247 Minn. 98, 76 N.W.2d 505, *cert. dismissed*, 352 U.S. 801 (1956), the state court orders under attack had been issued *after the remand* of the case by the federal court. The reference in *Styers v. Pico, Inc.*, 236 Ga. 258, 223 S.E.2d 656, 657 (1976) is dicta: the case there removed was dismissed rather than remanded by the federal court, and in any event, the state court orders after removal were vacated on appeal. In *People v. Purofoy*, 116 Mich. App. 471, 323 N.W.2d 446 (1982), the requisite procedural elements of removal had never been fulfilled, so there were no post-removal proceedings to be questioned. Finally, the case of *Victory Cabinet Co. v. Insurance Co. of North America*, 183 F.2d 360 (7th Cir. 1950), was decided under the pre-1948 statutory procedure, and therefore has no bearing on the present case.

Indeed—with the possible exception of the Florida decision in *Wilson v. Sandstrom*—there is *not one* other decision, state or federal, upholding under section 1446 (e) the validity of substantial state court proceedings taken after removal and prior to remand.[15] Thus, the

[14] The case was remanded at 5:55 p.m. on July 3, 1975, while the state court injunctive order in question was entered at 6:10 p.m. that same day. 317 So. 2d at 741.

[15] A minor exception has been recognized for merely "ministerial" acts by state courts after remand. *See, e.g., Master Equip., Inc. v. Home Ins. Co.*, 342 F. Supp. 549 (E.D. Pa. 1972) (after case was removed to federal court, state court could act to correct its own records to strike a default judgment); *Worsham v. Fidelity Union Life Ins. Co.*, 483 S.W.2d 44 (Tex. Civ. App. Ct. 1972) (entry of a written default judgment after case was removed to federal court was an appropriate ministerial act, when an oral default judgment had been rendered in open court *before* removal). The

Oklahoma decisions below conflict directly with the decisions of many highest state courts, and with the decisions of several federal courts of appeals.

Despite the overwhelming authority in favor of strict interpretation of the "proceed no further" rule, this case brings to the surface a simmering reluctance of some state courts to accept the clear command of section 1446 (e). The cases cited by the Oklahoma court, although ultimately decided on other grounds, exhibit confusion and perhaps a latent inclination to validate state court proceedings conducted between removal and remand, should the opportunity be presented. In this state of the law, it is particularly important that this Court take prompt action to overturn a decision which directly departs from well reasoned precedent, by permitting jury verdicts rendered after the case had been removed to federal court to serve as the basis for judgment. No more blatant departure from the command of section 1446(e) that the state court "shall proceed no further" can be imagined, and the decision below can only serve to encourage other courts to ignore the mandate of the removal statute when they so desire.

II. THE OKLAHOMA DECISIONS INJECT DOUBT INTO AN AREA OF RELATIONS BETWEEN STATE AND FEDERAL COURTS WHERE CERTAINTY IS IMPERATIVE

The question of federal law on which the Oklahoma courts have brought themselves into conflict with other state and federal courts is an important one.[16] In the

interim proceedings and jury verdicts had in the Oklahoma trial court below, however, were far from "ministerial" in nature.

[16] The views of the state courts are particularly important in this respect, because the validity of proceedings conducted in state court in the interim between removal and remand is usually resolved on direct review of the state court judgment. Federal review of the question occurs under fairly rare circumstances, such as in a habeus

context of removal, certainty over the precise division of authority between state and federal courts is vital for at least three reasons.

First, any uncertainty concerning the effect of removal upon the state court's jurisdiction necessarily invites duplication of judicial effort. In many, if not most, cases removed to federal court, a motion for remand will be unsuccessful. In those cases, any interim state court proceedings will be a complete waste of scarce judicial resources. When Congress revised and simplified removal in 1948, it adopted measures that, properly interpreted, will eliminate the exercise of concurrent jurisdiction while the removability of a case is under consideration. The Oklahoma decisions here ignore the bright-line test of removal embodied in section 1446, and revive the hazy twilight that existed under the former statutory arrangement.[17] Such a doubtful situation should not be permitted to continue. In order to provide the systemic discipline necessary to ensure that the arresting command of section 1446(e) will be heeded, *all* proceedings in contravention of the statute must be declared void. Any precedent to the contrary necessarily gives rise to a dangerous element of uncertainty.

Second, it is unfair to compel removing defendants to proceed in state court notwithstanding the perfection of removal. In these circumstances, our system of judicial federalism suffers because, in effect, the federal policies underlying the several statutory bases of removal—existence of a federal claim, naming of a federal officer as defendant, denial of federal civil rights, or protection of

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corpus petition to challenge a state criminal judgment. *See, e.g., Moore*, 447 F.2d at 1072-74.

[17] The error below is in no way saved by the fact that the case was ultimately remanded. The *risk* of judicial duplication exists whenever the state court proceeds after removal without knowing whether the case will ever be returned to its original forum.

a nonresident defendant—are overruled by the state court. A defendant who has effected a removal on grounds of diversity should not be forced unilaterally to proceed in a state forum.

Third, the absence of a bright line test creates a risk of further disruption of the careful balance between federal and state authorities. If a state court perceives itself to enjoy discretion whether to proceed, it may be tempted to cling to its jurisdiction and continue its proceedings, and thus to present the federal court with a *fait accompli*.[18] Where, as here, the state court has refused to relinquish jurisdiction and has proceeded to verdicts, the federal court may be discouraged from recognizing and exercising its own valid jurisdiction—thereby depriving the defendant of a forum to which it is statutorily entitled. The danger of the state court proceeding is particularly acute when the state court attempts, after a case has been removed, to undercut the underlying grounds for removal of the case, as reflected in the state court record. *E.g., Parker v. Brown*, 570 F. Supp. 640 (S.D. Ohio 1983); *State ex rel. Allis-Chalmers Manufacturing Co. v. Boone Circuit Court*, 227 Ind. 327, 86 N.E.2d 74 (1949).[19] In effect, the defend-

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[18] Part of this temptation may arise from a desire on the part of the state court to exert some discipline over a removal perceived to be unwarranted, or perhaps even vexatious. Federal law provides, however, adequate safeguards against frivolous petitions for removal. Section 1446 requires the filing of a verified complaint, to be accompanied by the provision of an adequate bond. § 1446(a), (b), (d). In addition, Fed. R. Civ. P. 11 sanctions may be imposed against counsel who brings a removal petition in bad faith. *See Davis v. Veslan Enterp.*, 765 F.2d 494 (5th Cir. 1985). Notably, under the federal statute and rules, it is the federal court, rather than the state court, that is expected to supervise removal.

[19] A subtle version of this abuse occurred in the case before this Court. *After* the case had been removed to federal court, the state trial court included in its further proceedings a supplementation of the record concerning the circumstances and voluntariness of

ant is subjected to state court jurisdiction where none properly exists. As a result, the defendant may not only be faced with the consequences of an adverse judgment or order of interim relief entered after removal, but will almost certainly be compelled to incur the expense of continuing to litigate a case before a court that lacks authority to proceed.

It is particularly important in this area of the law that individual state courts not be allowed to engage in piecemeal modification of the existing rule. The opportunities for chaos and waste are manifest, if various state trial and appellate courts make different decisions, on the basis of their individual preferences, either to "proceed no further" or "proceed at peril" after a case has been removed to federal court. If the "proceed no further" rule is to be changed, it must be done across the board, on a nationwide basis.

There have been several proposals since 1948 to amend the removal statute generally, so as to permit a state court to "proceed at peril" after removal of a case to federal court,[20] but none of these proposals has resulted in a

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the dismissal of the resident defendant. For instance, the trial court went back to state that "Whatever it was, plaintiffs didn't agree to it." Transcript of the Record in *Bell v. Burlington Northern R.R.* at 1424, Nos. C-81-347 & C-81-460 (June 21, 1983) (unreported); *contra* transcript excerpts cited *supra*, at n.1 (record prior to removal: plaintiff's counsel stated three times that he had no objection to the demurrer being sustained). Although any proceedings conducted by the state court after the removal were void and of no consequence, the United States District Court cited this post-removal conclusion by the state court judge in rendering its decision to remand the case. Pet. App. 39a. Thus, by continuing its proceedings after the removal, the state court effectively undercut Burlington Northern's ability to sustain the removal.

[20] In 1969, for instance, the American Law Institute (ALI) proposed a statutory revision that would have amended section 1446 so that when removal occurs once a trial is in progress, the state court may complete its trial, and enter judgment if and when

change for *civil* cases. Moreover, when Congress did amend the removal procedure in *criminal* cases in 1977, it acted on a clear understanding that existing case law under section 1446 overwhelmingly rejected the "proceed at peril" rule of the pre-1948 removal scheme.[21] Thus, the legislative record since enactment of section 1446(e) demonstrates Congress' awareness and acceptance of the conclusion, reached by virtually all courts that have considered the issue, that in a civil case any state court proceedings conducted after removal are absolutely void.

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the case is remanded. ALI, *Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft*, 1969, § 1383(a). The ALI presented its proposed revision as an "exception to the general rule" that the state court may not proceed after removal, and that if it does, its actions are void. *Id.* at 357-58. The ALI Draft elaborates:

> In one unreported case, in which a petition for removal that bordered on the frivolous was filed at the close of all the evidence, the state court went ahead and submitted the case to the jury, which returned a substantial verdict against the removing party. *Yet it seems quite clear that under present law no effect could be given such a verdict, and that a new trial was required.* This is the logical consequence of the cases previously cited holding that any action by the state court after removal is effected is void.

Id. at 359 (citations omitted) (emphasis added). The situation described matches almost exactly the case at bar, with the exception that Burlington Northern's petition for removal was far from frivolous.

[21] In recommending enactment of that revision for criminal cases, the Advisory Committee of the Judicial Conference: (1) recognized the undisputed existing case law as to both civil and criminal cases, requiring invalidation of any state court proceedings in the interim between removal and remand; and (2) addressed the problems presented in criminal cases, as contrasted with civil removal proceedings. *Rules of Procedure, Communication from the Chief Justice of the United States, House Doc. No. 94-464*, 94th Cong., 2d Sess. (1976); *accord Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 304-07 (Feb. 23, 24 & Mar. 2, 1977).

Accordingly, the decisions below, if permitted to stand, will represent a dangerous and unwarranted departure from existing law. No state should be permitted such leeway in such a vital area of federal law, whether out of design or error. Litigants and courts should not have to endure the risk that extensive legal proceedings will have to be voided, either because a federal court does not remand the removed case, or because the "proceed no further" rule is adopted by the relevant jurisdiction. Given the confusion already reflected in other cases on the issue, if the direct holding of the courts below is permitted to stand, substantial mischief is likely to follow.[22]

Petitioner emphasizes that the decisions below do not represent an "experiment" in judicial federalism worthy of extended consideration. The Oklahoma Court of Appeals obviously did not consider its decision as such, for it ruled under the misguided impression that it was following the weight of existing authority. Furthermore, even if one were to assume that this were an experiment in civil procedure, it would be one without any prospective merit. The Oklahoma courts have simply turned back the clock to the "proceed at peril" rule that Congress revoked in 1948. Thus, there is no reason for this Court to await further developments in this area before exercising its powers of review. The error below should be corrected immediately, before its spreads.

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[22] For evidence of confusion, see the cases cited *supra*, at 14. This case itself provides an example of the confusion that can arise when a party is unable to understand the command of § 1446(e). Respondents explained below that the reasons for their failure to move immediately for a remand of the case (which might have eliminated the entire problem) were their reliance on *Sinclair Oil & Gas Co. v. Albright*, 161 Okla. 272, 18 P.2d 540 (1933), a case decided fifteen years before § 1446(e) was enacted, and their understanding that the 1948 amendments had no significant impact on the federal law of removal. Answer Brief of Appellees, Charles O. Bell, Jr. and Tank Trucks, Inc., No. 62,757 at 34-35 (Okla. June 3, 1985).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals of the State of Oklahoma, and that order and judgment should be summarily reversed.

Respectfully submitted,

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March 13, 1987

APPENDIX

APPENDIX

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APPENDIX

IN THE COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

No. 62,757

For Publication

CHARLES O. BELL, JR., and TANK TRUCKS, INC.,
Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
and SAM SCULLY,
Appellants.

[Filed Aug. 5, 1986]

APPEAL FROM THE DISTRICT COURT OF
CREEK COUNTY, OKLAHOMA

Honorable Donald D. Thompson, Trial Judge

Action by injured tank truck driver and owner of truck against railroad and conductor to recover damages which occurred when train struck truck at crossing. Near end of trial case was removed to federal court. Jury returned verdict for plaintiff upon which judgment was rendered after remand. From denial of a new trial, railroad appeals.

AFFIRMED

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Burlington Northern

BRIGHTMIRE, J.

Foremost among the issues raised in the defending railroad's appeal from the judgment below is the effect of its ill-fated lunch hour removal of the action to federal court which it sought in an effort to abort and lay waste to a long trial just as argument to the jury was about to commence. Notwithstanding the removal, the trial judge proceeded to complete the trial which eventuated in a verdict and judgment for plaintiffs.

We hold no reversible error affects the judgment and affirm it.

I

The operative facts are these. Near Kiefer, Oklahoma, on a hot August day in 1981, a tank truck driven in a westerly direction by 27-year-old plaintiff Charles O. Bell—and owned by plaintiff Tank Trucks, Inc.—was struck at a railroad crossing by a speeding, northbound, backward-traveling engine, owned and operated by defendant Burlington Northern Railroad Company.

Bell, whose multiple injuries included loss of his right leg, a fused left leg, and a practically useless right arm, and Tank Trucks each filed lawsuits against Burlington and its train conductor, Sam Scully, seeking recovery of damages each had sustained—Bell for his injuries and Tank Trucks for destruction of their truck.[1] Each plaintiff alleged the commission of specific acts of negligence by each of the defendants which contributed to the cause of the wreck. The railroad's engineer was said to be operating the engine at an unreasonable speed of 58 miles per hour in a posted speed zone of 45 miles per hour and failed to sound a whistle as the engine approached the subject crossing. Burlington otherwise contributed to the disaster, according to plaintiffs' evidence, by allowing a blind crossing to exist, created a growth of trees and

[1] The two cases were consolidated for trial.

brush on its right-of-way some 320 feet south of the crossing—the direction from whence came its backing engine.

Following some twenty-one months of pretrial preparation, including extensive discovery activity, a jury was seated June 13, 1983, in Sapulpa, Oklahoma, to decide the factual issues. For over a week the parties presented their evidence to the jury. Plaintiffs supported their allegations with evidence of both negligence and consequential damages. Demurrers of both defendants to plaintiffs' proof were overruled and both presented their defensive evidence. The parties rested during the morning of June 21, 1983. Defendants each again "demurred," and the trial judge indicated that because the alleged negligence of conductor Scully was imputable to the railroad, the instructions and verdict forms might be easier to prepare and understand if he sustained the conductor's demurrer. Neither plaintiff agreed to the proposed ruling and Tank Trucks objected to a demurrer being sustained. Nevertheless the conductor's demurrer was sustained and he was dismissed from the case. The court then instructed the jury on the law and recessed for lunch.

After the noon break the court and jury reassembled. Defense counsel at once stood up and announced in open court that it had filed a petition for removal to federal court during the noon recess and advised that "the court has lost jurisdiction." The trial judge, however, disregarded the maneuver and directed the lawyers to make their arguments to the jury. They did. The jury was then sent out to deliberate and eventually it returned a verdict finding plaintiff Bell twenty percent at fault and the railroad eighty percent. Mr. Bell's damage was fixed at $1,090,602.07 and Tank Truck's at $34,000.[2]

[2] At first they returned with a punitive damage award equal to the amount of the compensatory damage award, but upon being polled it appeared the award was error. They returned to the

Plaintiffs moved for a new trial against defendant Scully and at the same time filed motions in federal court to reject the removal action and remand the matter to state court. On March 27, 1984, the U.S. District Court did so saying, among other things, that the federal court was "without jurisdiction" and that the court had "considerable doubt as to whether [the actions were] properly removed" in the first place.

Thereafter plaintiffs' motions to reinstate Scully as a defendant were overruled, and on June 26, 1984, the state judge rendered a judgment on the verdict previously returned. On the same day the court overruled plaintiffs' motion for a new trial. The judgment was stayed after defendant filed a supersedeas bond on June 29, 1984, and this appeal was filed July 25, 1984.

II

Burlington's first proposition is that the trial court erred in failing to instruct the factfinders that conductor Scully's negligence could not be imputed to the railroad or even considered by them in determining its liability.

Defendant's supporting argument is a convoluted attempt to reconcile two inconsistent positions it took during the proceedings below with respect to the conductor's dismissal. On the one hand it represented to the federal court as the basis for its attempted removal that Scully's dismissal was a voluntary one by plaintiffs. On the other hand it represented to the state court that the dismissal was an involuntary one by the court entitling it to the jury instruction concerning the legal effect of Scully's negligence.

The trial background for the issue is this. After the instructions were read, defense counsel began arguing once more about the instructions being misleading in

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jury room and later returned with a corrected verdict which awarded no punitive damages.

that the court had held plaintiffs could not recover against Scully and yet at the same time instructed the jury members that the train crew were the agents of the railroad, and they could consider their negligence. "Now, that's misleading," said defense counsel, "and I think it's imperative that the Court tell the jury . . . or allow Counsel to do it—that Sam Scully has been released as a matter of law and that his negligence can't be considered."

This introduced an extended rehash of what had already been settled after extensive discussion earlier in the day. What transpired after this raises the question of whether defendant was maneuvering for removal. As the lunch hour approached the court summed it up this way: "We talked a little bit [earlier in the day] and you all [referring to defendants] had moved that he get out, and I was trying to find a way to get him out as an individual. If you feel that there is some problem with what we have done, over the lunch hour, you all think about it."

"For the time being, let's leave it as it is, and we'll take it up further after lunch," said the Burlington lawyer.

"Maybe we can put him [Scully] back in after lunch," a plaintiff lawyer suggested.

"I indicated to you that I could leave him in," said the judge.

The court recessed for lunch.

When court reopened after noon, defense counsel did not "take it up further", however, but told of the removal as we mentioned earlier. The trial court decided to complete the nearly-finished trial and did.

It is not necessary to go into the tortuous circuitry of defendant's argument further than to point out that there

are two fundamental reasons why the court properly declined to give an instruction precisely like the one orally requested by defendant. First, the court gave an appropriate instruction on the subject, which the defendant had agreed to earlier in the day, and also told the jury that Scully was out of the lawsuit. And second, for the court to have gone beyond this and told the jury they could not consider the negligence of Scully would have been an erroneously restrictive comment on the evidence which would likely have confused the jurors and misled them into thinking that Scully had been charged with one or both of the two main wrongful acts complained of, when in fact he had not been so charged, but had been accused only of a failure to properly perform the supervisory role of sub-principal, i.e. prevent other employees from committing the wrongful acts that caused the wreck. Whether Scully properly carried out his responsibility or not neither increases nor diminishes the vicarious liability of the railroad because it was, after all, based on (a) the tortious conduct of the engineer, and (b) the wrongful acts of its other agents in failing to maintain a safer crossing. In other words under the facts of this case, Scully's dismissal—even if considered to be a finding of no civil liability on his part—does not have the exonerating effect on the railroad's respondeat superior liability that it would have if Scully were an employee whose specific tortfeasance was alleged to have caused the wreck. *See Hooper v. Clements Food Co.*, 694 P.2d 943 (Okl. 1985).

It also follows from the foregoing that giving agreed instruction No. 11 on agency was not misleading. All it said was that an act or omission of a train crew member acting within the scope of his authority or employment was in law the act or omission of the defendant railroad. That is the law.

Defendant's first contention is without merit.

III

Burlington's second assignment of error involves the construction of 28 U.S.C. § 1446(e) and the argument is that the trial court was without jurisdiction to take any further action in the case after receiving notice that defendant had taken the necessary steps to remove the case to federal court during the noon-hour recess on June 21; 1983.[3]

For support it relies mainly on the views of a Florida law student and a federal appeals court case quoting the thoughts of Professor Moore with respect to the meaning of § 1446(e).[4] That law states that when a defendant has filed a petition for removal and has otherwise complied with certain filing and notice requirements "the state court shall proceed no further unless and until the case is remanded."

The case that kindled the law student's rather caustic condemnation was one handed down in 1975 by the Florida Supreme Court in *Wilson v. Sandstrom*, 317 So.2d 732 (Fla. 1975), *cert. denied*, 423 U.S. 1053 (1976), in which it was held that an unsuccessful attempt to improperly remove a state court case to federal court does not deprive the state court of jurisdiction.

What the law student waded into was a legal controversy that arose after the passage of § 1446(e) in 1948—a controversy that forms the foundation for Burlington's second attack on subject judgment. Without

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[3] 28 U.S.C. § 1446(e) was first enacted in 1948 as a consolidation of the previously existing 28 U.S.C. §§ 72, 74, and 76. It was amended in 1949 and again in 1977. See "Historical and Revision Notes" following § 1446 in U.S.C.A.

[4] Case Note in 30 Univ. Miami L. Rev. 739 (1976) somewhat pompously entitled, "Florida Puts Federal Removal Jurisdiction and the Thirteenth Amendment in the Doghouse." The circuit court case is *U.S. Ex rel. Echevarria v. Silberglitt*, 441 F.2d 225 (2d Cir. 1971).

demonstrating evidence of an in-depth study of the problem or favoring the reader with fundamental legal reasoning, the student took to task not only the high court of Florida but a federal court as well for a ruling contrary to his views. It was suggested that the federal judge and *Wilson* all but stood alone against a "battery" of cases holding otherwise.[5] This rhetoric, however, borders on hyperbole. Overlooked or disregarded were other cases reaching the same result as the Illinois federal court such as *Victory Cabinet Co. v. Insurance Co. of North America*, 183 F.2d 360 (7th Cir., 1950); *Doerr v. Warner*, 76 N.W.2d 505 (Minn. 1956), *cert. dismissed*, 352 U.S. 801 (1956); *Styers v. Pico, Inc.*, 223 S.E.2d 656 (Ga. 1976); and *People v. Purofoy*, 116 Mich. App. 471, 323 N.W.2d 446 (1982).

Frankly, we think the reasoning of *Victory Cabinet Co.* is sound. The 1948 enactment replaced removal statutes that had been on the books for many years. 28 U.S.C. §§ 72-76. The question that emerges from a review of both the old and new removal laws, the before and after decisions on the subject, and the historical facts and circumstances surrounding the 1948 enactment is whether § 1446(e) was intended to and in fact did nullify the reasonable and practical principle promulgated by the United States Supreme Court in *Metropolitan Casualty Insurance Co. v. Stevens*, 312 U.S. 563 (1941), in construing basically the same language in § 72, namely, the phrase "proceed no further." Said the court:

> "The rule that proceedings in the state court subsequent to the petition for removal are valid if the suit was not in fact removable is the logical corollary of the proposition that such proceedings are void if the cause was removable."

In other words the Supreme Court found these rules to be implicit in the old statute's proscription "proceed no

[5] The condemned case is *F & L Drug Corp. v. American Central Insurance Co.*, 200 F. Supp. 718 (D. Conn. 1961).

further." We are of the opinion the new statute did not intend to and in fact did not alter the *Metropolitan* rationale or implications.

An analysis of § 1446(e), especially in context of the restrictive provisos of subsections (a), (b) and (d), we think confirms this conclusion. Subsection (e) reads:

> "(e) Promptly after the filing of such petition [for the removal of a civil action] and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall *proceed no further* unless and until the case is remanded." (Emphasis added.)

As we mentioned earlier in footnote 3, the "Historical and Revision Notes" of the United States Code Annotated state that subsection (e) "is derived from sections 72, 74 and 76 of Title 28," U.S.C., 1940 edition. The fact is that the language of § 1446(e) we have italicized is exactly the same language contained in the preexisting statute—28 U.S.C. § 72. After specifying steps required to effect a removal, § 72 provided, upon fulfilling the prerequisites, that: "It shall be the duty of the State Court to accept paid petition [of removal] and bond and *proceed no further* in such suit."

As we indicated, the phrase "proceed no further" is the crucial one in both the old and new statutes and on its face is a definite unlimited command to cease exercising jurisdiction once a petition for removal is filed and bond and notice requirements have been met. No end of the terminating command was mentioned in the old statute. Obviously the implication has always been that it ended if and when the case was remanded.[6] But the statute did not expressly say this and so it appears

[6] *See e.g.* the problem in *Styers v. Pico*, 223 S.E.2d 656 (1976), involving the effect of a dismissal of a removed case before remand.

that Congress thought it should be made clear by adding the narrowing language, "unless the case is remanded."[7] The appended words were limiting in nature, that is, they limit rather than extend the scope of the "proceed no further" clause. Certain it is that the "unless" phrase presents no connotation of an intent to nullify the salutary, perceptive and sensible *Metropolitan Casualty Insurance Co.* precept. Had Congress so intended it would have said so.

Looking at the issue from another perspective, that of jurisdiction, one would have to say that if, upon the filing of a petition for removal, the state court ipso facto loses all jurisdiction and it is later determined that the federal court has no jurisdiction then we have the anomalous phenomenon of litigants being cast into a judicial netherland, the existence of an action suspended in a jurisdictionless void, a lawsuit in limbo as it were, where it is possible to remain indefinitely if the federal court chooses not to act. It is reasonable to assume that in enacting § 1446(e) Congress did not intend such a result nor did it intend to provide a defendant with a means of halting a lengthy trial just before the case is to be given to the jury, especially if the attempted removal is frivolous, doubtful, in bad faith, or otherwise improper. For to intend such a result is to unnecessarily impose an onerous burden on both the federal and state judicial systems, promote great waste of state resources, and oppress hapless litigants by subjecting them to distressing losses of time and money and often deprive parties of justice, all wrought by unwarranted removal delay that can last for months as indeed it did in this case. These haunting problems warrant emphasizing a point we discuss more fully later on, namely that § 1446 contemplates that once the trial of a civil case has begun, the plaintiff should be permitted to complete it even in

[7] The words "and until" were not added until 1949.

the face of the filing of a removal petition. This is the implicit holding of *Lathrop, Shea, & Henwood Co. v. Interior Construction & Improvement Co.*, 215 U.S. 246 (1909). *See also Connelly v. Jennings*, 207 Okl. 554, 252 P.2d 133 (1952).

Parenthetically, it should be noted that several years prior to *Metropolitan* the supreme court of this state reached the same legal conclusion in *Sinclair Oil & Gas Co. v. Albright*, 161 Okl. 272, 18 P.2d 540 (1933). Akin to this rule is an even more cogent one stated in *Great Northern Ry. v. Alexander*, 246 U.S. 276 (1918), in which the Supreme Court of the United States held:

> "[T]he plaintiff may, by the allegations of his complaint, [there being no fraudulent purpose to evade removal] determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses."

See also the construction of 28 U.S.C.A. § 1332 by the high court in *Kellam v. Keith*, 144 U.S. 568 (1892), holding that for removal to be proper on the ground of diversity such ground must exist at the time the action is filed in state court and must still exist at the time the petition for removal is filed. All of the foregoing law has been settled so well for so long that the question of the railroad's good faith looms exceedingly large with regard to its attempted removal of sub judice case.

Finally, we think the new statute does not contemplate removal after trial has commenced in a state court civil

action. The 1948 revision changed primarily the methodology of perfecting a removal proceeding. State court involvement was eliminated. With regard to criminal matters, § 1446(c) authorizes removal of criminal prosecutions only before trial. And while the provisions relating to civil cases—subsections (a), (b), and (d)—do not expressly mention such a restriction, they seem to contemplate only pretrial removal because the limits they prescribe are related to pretrial matters, namely, receipt by defendant of the initial pleading, service of summons, receipt of "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." The new statute like its predecessor has universally been given a strict construction in favor of state court jurisdiction, and the federal courts have taken the position that they have no authority to enlarge, change or modify the clear terms and provisions of removal statutes. The oldest circuit decision cited for this rule in note 2 of § 1446 is *Delbanco v. Singletary*, 40 F. 177 (9th Cir. 1889), and the latest is *American Home Assurance Co. v. Insular Underwriters Corp.*, 494 F.2d 317 (1st Cir. 1974). Such, incidentally, was the construction given § 1446 by the high tribunal of this state in *Connelly v. Jennings*. In holding that that law did not contemplate removal after commencement of a trial, the court rejected defendant's argument that § 1446 changed the rule theretofore adopted by the U.S. Supreme Court in construing the old removal law saying:

> "We do not think this change [§ 1446] was intended to affect a case that was in the process of being tried, but only applied to matters arising prior to trial. We realize that this view is subject to the criticism that a cause is permitted to be retained in the state court just by the strength of the pleadings and not by the facts; but this condition existed prior to the change, and Congress must have been aware

> of the Supreme Court's interpretation of the question, and if it intended to change the rule as to cases in process of trial it would have done so."

This view is further confirmed by the rationale and holding of the court in *Virginia v. Rives*, 100 U.S. 313 (1880), strictly construing a civil rights removal statute as being applicable only to pretrial removal.

We hold, therefore, that the proceedings and judgment rendered in this case after the removal petition was filed were not void and their validity became unchallengeable upon it being determined that the federal court never acquired jurisdiction of the lawsuit—a conclusion that is in harmony with the pronouncement of the United States Supreme Court in *Metropolitan Casualty Insurance Co.*

IV

Burlington's third proposition concerns the trial court's failure to prevent what Burlington considers to be prejudicial references by plaintiff during the trial to his family and the effect of his injuries on them.

More specifically, the complaint is that plaintiff's counsel mentioned to the jury several times in substance that plaintiff lived in Sapulpa with his wife Betty and his two boys, ages two and six. He did it during voir dire to determine if the prospective jurors knew any of them. He mentioned the family again during opening statement, during Mrs. Bell's direct examination, and during plaintiff's brother's testimony to develop the nature of Mr. Bell's association with his children before his injuries and how the injuries had adversely affected the relationship. Defendant relies on some case law in this state that predates our 1978 evidence code, e.g. *Midland Valley Ry. v. Manios*, 307 P.2d 545 (Okl. 1956). Thus resolution of this issue requires a consideration of 12 O.S. 1981 §§ 2401, 2402 and 2403. "All relevant evidence is admissible, except as otherwise provided by

[law]", reads § 2402. The term "relevant evidence" is defined in § 2401 to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." And finally, § 2403 authorizes exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."

We hold the evidence complained of was relevant evidence concerning plaintiff's detriment. In his petition, plaintiff pleaded that before the extensive injuries inflicted on him by defendant he was a 27-year-old able-bodied man able to care for his wife and two children. Now, however, he is a cripple, totally and permanently disabled, whose earning capacity is destroyed and who is suffering both severe physical pain and mental anguish. These allegations furnished a sufficient predicate for admitting evidence with respect to the nature and extent of his family and his familial obligations as foundation proof of the following elements of detriment: (a) mental distress resulting from impairment of capacity to support and care for his family, and (b) impairment of his capacity to enjoy a normal family life with regard to his relationship to and interaction with both his wife and his two little boys.[8]

V

Defendant's last contention is that various rulings throughout the trial demonstrated a bias in favor of plaintiffs of such a nature as to "constitute reversible error."

We are not sure we fully understand this one. Ordinarily one thinks of disqualifying a judge because of a bias, but not of a bias as such being a reversible error.

[8] *See* 23 O.S. 1981 §§ 1, 3, 4, 5 and 61. *See also, Lebrecht v. Bethlehem Steel Corp.*, 402 F.2d 565 (2d Cir. 1968).

There, of course, may be errors which occur as a result of bias or a bias can prevent a party from receiving a fair trial. Here the defendant attempts to establish a bias on the basis of a course of conduct it disapproves and argues the alleged bias per se is an error. The occurrences which are said to demonstrate a bias are: (a) sustaining plaintiffs' objection to the train engineer sitting at the counsel table as the railroad's representative. This was later resolved by a withdrawal of the objection; (b) sending the sheriff for some people out on strike at a local glass plant when additional prospective jurors were needed for selection of an alternate juror who as it turns out never became a juror; (c) inconsistent rulings as perceived by defendant, with respect to the scope of cross-examination of two different witnesses; and (d) inconsistent rulings according to defendant, on some motions in limine.

To give the defendant a full measure of consideration we will treat its proposition as though it presents this critical issue—whether, under all the circumstances, defendants received a fair trial. We have reviewed these matters not only in terms of defendant's argument but in context of a multi-volume 1450 page record. The case was tried with vigor by competent and experienced counsel on both sides of the lawsuit. If we were to concede that one or more of the foregoing complaints had some merit we do not think it would justify an inference of a bias that prevented defendants from receiving a fair trial. As a matter of fact considering defense counsel's strategem we think the trial court demonstrated a remarkable understanding of the issues, reasonable restraint, unruffled temperament in the face of perturbable legal complexities, and he managed to maintain control of a lawsuit that could have easily been lost in the storm of rigorous advocacy. If indeed the trial judge made some mistakes so did defense counsel. For example, defendant's complaint about inappropriate

rulings with regard to its cross-examination of a witness is a rather curious one because defendants obviously should not have been permitted to "cross-examine" themselves. Surely, given the purpose of and reason for cross-examination, defense counsel does not expect us to take seriously his contention that the court erred in refusing to permit him to cross-examine his own client who had been called to the stand by plaintiffs. There is, of course, a distinct difference between a request to "cross examine" a defendant put on the stand by plaintiff and a request to cross-examine a non-party witness called by defendant. The trial court had a right to and should have exercised his discretion differently under such circumstances.

In short, we are, not persuaded the alleged errors complained of demonstrate a bias for or against either party. Our review of the lengthy record leads us to the conclusion that while the parties may not have received a perfect trial, they received a fair one and one free from reversible error.

Affirmed.

STUBBLEFIELD, P.J., and RAPP, J., concur.

August 5, 1986

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

[Filed Nov. 19, 1986]

Wednesday, November 19, 1986

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

• • • •

62,757 Charles O. Bell, Jr. and Tank Trucks, Inc. v. Burlington Northern Railroad Company.
Certiorari denied. Appellees' application for attorney fees granted; remanded to trial court to fix amount.

VOTE ON DENIAL OF CERTIORARI:

CONCUR: Simms, C.J., Hodges, Hargrave, Wilson, Summers, JJ.

DISSENT: Doolin, V.C.J., Lavender, Opala, Kauger, JJ.

VOTE ON APPLICATION FOR ATTORNEY FEES:

CONCUR: Doolin, V.C.J., Hodges, Lavender, Hargrave, Opala, Wilson, Kauger, Summers, JJ.

• • • •

IN THE DISTRICT COURT
IN AND FOR CREEK COUNTY
STATE OF OKLAHOMA
SAPULPA DIVISION

No. C-81-347
No. C-81-460
(Consolidated)

CHARLES O. BELL, JR.,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
and SAM SCULLY,
Defendants.

TANK TRUCKS, INC.,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
and SAM SCULLY,
Defendants.

[Filed June 26, 1984]

JOURNAL ENTRY OF JUDGMENT

On the 13th day of June, 1983, these consolidated cases came on for trial pursuant to regular jury docket setting. The Plaintiff, Charles O. Bell, Jr., appeared in person, and by his attorneys, Gene Stipe, Richard Gossett, and Michael Parks. The Plaintiff, Tank Trucks, Inc.,

appeared by its attorney, Richard Gibbon. The Defendants, Burlington Northern Railroad Company and Sam Scully, appeared in person, and by their attorneys, Grey W. Satterfield, John Leo Wagner, Sam T. Allen IV, and Richard Wicka. Both sides announced ready to proceed with trial. Thereafter, a jury of twelve men and women were selected and sworn to try the case and evidence as presented to them. The matter thereafter proceeded to trial and was concluded on June 21, 1983. At the conclusion of the Plaintiffs' evidence, the Defendants interposed a demurrer to the evidence, which was overruled.

Thereafter, jury trial upon the merits continuing, the Defendants presented evidence and both sides rested. At the conclusion of the Defendants' evidence, the Plaintiffs interposed motions for directed verdicts, as to the issue of liability, which were overruled. The Defendants renewed their demurrers to the evidence, and the Court sustained the demurrer of the Defendant, Sam Scully, only. Before submission of the case to the jury, the Court was advised by Defendant, Burlington Northern Railroad Company, that it had removed the case to the United States District Court for the Northern District of Oklahoma, and claimed that this Court was without jurisdiction to proceed further. The Court then ordered the parties to proceed with the trial. After closing arguments, the jury deliberated and returned the following verdict:

"VERDICT"

"We the jury impanelled and sworn in the above entitled cause, do upon our oathes find that the Plaintiff, Charles O. Bell, Jr., was 20% negligent, and the Defendant, Burlington Northern Railroad Company, was 80% negligent.

We the jury impanelled and sworn in the above entitled cause, do upon our oathes find for the Plaintiff, Charles O. Bell, Jr., and against the Defendant, Burlington Northern Railroad Company, in the amount of

$1,090,602.07 compensatory damages, and $0.00 exemplary damages.

We the jury impanelled and sworn in the above entitled cause, do upon our oathes find for the Plaintiff, Tank Trucks, Inc., and against the Defendant, Burlington Northern Railroad Company, in the amount of $34,000.00."

The Court received the verdicts, and after concluding they were in proper form, directed that they be filed of record in the cause. Said verdicts were returned on June 21, 1983.

It is therefore ordered, adjudged and decreed by the Court, based upon the aforesaid verdict, that Plaintiff, Charles O. Bell, Jr., be awarded judgment against the Defendant, Burlington Northern Railroad Company, in the total sum of $872,481.60, being the amount of the verdict less the comparative negligence of Charles O. Bell, Jr., with pre-judgment interest thereon, pursuant to 12 O.S. § 727, at the rate of 10% per annum from the date of filing, August 31, 1981, through April 1, 1982, which comes to a total of $50,914.68. Plaintiff, Charles O. Bell, Jr., is also awarded pre-judgment interest from April 1, 1982, through June 21, 1983, pursuant to 12 O.S. § 727, at the rate of 15% per annum, which comes to a total of $159,915.12. The Plaintiff, Charles O. Bell, Jr., is therefore awarded total pre-judgment interest in the amount of $211,188.87, which will be added to the verdict of the jury for a total judgment of $1,083,311.40, plus post-judgment interest thereon, pursuant to 12 O.S. § 727 at the rate of 15% per annum, from June 21, 1983, until the date said judgment is paid, together with his allowable costs in the amount of $4,145.02 pursuant to 12 O.S. § 928.

It is therefore ordered, adjudged and decreed by the Court, based upon the aforesaid verdict, that Plaintiff, Tank Trucks, Inc., be awarded judgment against the

Defendant, Burlington Northern Railroad Company, in the total sum of $27,200.00, being the total amount of the verdict reduced by the comparative negligence of Charles O. Bell, Jr., the employee of Tank Trucks, Inc., plus post-judgment interest thereon, pursuant to 12 O.S. § 727, at the rate of 15% per annum, from June 21, 1983, until the date the judgment is paid, together with its allowable costs in the amount of $46.00 pursuant to 12 O.S. § 928. Further, the Court reserves its decisions on any award of attorneys fees to the prevailing party pursuant to 12 O.S. § 940, until further application by the parties.

DATED this 26th day of June, 1984.

/s/ Donald D. Thompson
THE HONORABLE DONALD THOMPSON
District Judge

APPROVED AS TO FORM:

/s/ Richard L. Gossett
RICHARD L. GOSSETT
Attorney for Plaintiff,
Charles O. Bell, Jr.

/s/ Richard D. Gibbon
RICHARD D. GIBBON
Attorney for Plaintiff,
Tank Trucks, Inc.

/s/ Ben Franklin
BEN FRANKLIN
Attorney for Defendants,
Burlington Northern Railroad Co.
and Sam Scully

84-696tn

28 U.S.C. § 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) (1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to

state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or de-

fendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 83-C-535-C
Consolidated

TANK TRUCKS, INC., a corporation,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLY,
Defendants.

CHARLES O. BELL, JR.,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLY,
Defendants.

[Filed June 21, 1983]

PETITION FOR REMOVAL

Petitioner, Burlington Northern Railroad Company, in support of its petition for removal, states:

I.

That said actions are suits of a civil nature at law in which the District Court of the United States has original jurisdiction, and were originally brought and are now pending in the District Court of Creek County and is now being tried; said actions were consolidated by the

State Court. The action of Charles O. Bell, Jr., v. Burlington Northern Railroad Company became removable under the provisions of 28 U.S.C.A. § 1446(b) on June ——, 1983, when counsel for plaintiff, Charles O. Bell, Jr., indicated in the record that he voluntarily had relinquished any intention of obtaining or collecting a judgment against Sam Scully. As a result of the foregoing, no resident defendant remains in the case against whom plaintiff is seeking judgment.

Petitioner further shows that the matter in dispute in Charles O. Bell, Jr., v. Tank Trucks, Inc., exceeds, exclusive of interest and costs, the sum of $10,000.00.

II.

Your petitioner shows that, at the commencement of this action and at the present time, Charles O. Bell, Jr., was and is a citizen and resident of Creek County, Oklahoma, residing in Sapulpa, Oklahoma, and plaintiff, Tank Trucks, Inc., was an Oklahoma corporation with its principal place of business in Kiefer, Oklahoma, as shown in their petitions filed in State Court and that this petitioner was and is a Delaware corporation having its principal place of business in St. Paul, Minnesota.

Petitioner is entitled to removal for the following reasons:

(a) Plaintiff, Charles O. Bell, Jr., has, through his counsel, stated in the record that he no longer has any intention of obtaining or collecting judgment against the only resident defendant, Sam Scully. Said comment had the effect of dismissing plaintiff's claim against said defendant, so that he is no longer a party to this action for the purposes of removal.

(b) This action therefore now involves a controversy wholly between citizens of different states which can be fully determined between them and over which this Court has venue and jurisdiction.

III.

By reason of the premises, your petitioner desires and is entitled to have said suits removed from the District Court of Creek County, Oklahoma, into the District Court of the United States for the Northern District of Oklahoma.

IV.

Your petitioner offers a bond with a good and sufficient security for paying all costs that may be awarded by said District Court of the United States if said Court shall hold that said suits were wrongfully or improperly removed.

V.

Defendant, Sam H. Scully, to the extent that he may still be considered a party hereto, consents, if necessary, to this removal and joins with the petitioner in the removal of these actions to this Court from the District Court of Creek County, Oklahoma.

VI.

Simultaneously and separately filed herewith are all of the processed pleadings and orders served upon defendants in these actions. Copies of these are not furnished to plaintiffs since they already have copies.

GREY W. SATTERFIELD and
JOHN LEO WAGNER of

KORNFELD SATTERFIELD MCMILLIN
HARMON PHILLIPS & UPP
301 N.W. 63rd, Suite 600
P.O. Box 26400
Oklahoma City, Oklahoma 73126
(405) 840-2731

Attorneys for Defendant

83-983fs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 83-C-535-C
Consolidated

TANK TRUCKS, INC., a corporation,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLY,
Defendants.

CHARLES O. BELL, JR.,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLEY,
Defendants.

[Filed June 21, 1983]

BOND ON REMOVAL

KNOW ALL MEN BY THESE PRESENTS:

That Burlington Northern Railroad Company (formerly Burlington Northern, Inc.), as principal, and the St. Paul Fire and Marine Insurance Company, as surety, are held and firmly bound unto Tank Trucks, Inc., and Charles O. Bell, Jr., in the penal sum of Five Hundred and no/100 Dollars ($500.00), for the payment of which

we bind ourselves, our successors and assigns, jointly and severally, on the condition that the defendant herein, having petitioned the United States District Court for the Northern District of Oklahoma for the removal to that Court of this cause of action from the District Court of Creek County, Oklahoma, shall pay all court costs ordered by said Federal Court, should the removal be determined to be improper.

NOW, THEREFORE, should said removal not be held to be improper, or if held improper, the defendant shall pay all costs which may be awarded by said United States District Court, then this obligation shall be void; otherwise, this obligation shall be in full force and effect.

WITNESS OUR HANDS on this the —— day of June, 1983.

BURLINGTON NORTHERN RAILROAD CO.

By: _____

GREY W. SATTERFIELD of

KORNFELD SATTERFIELD MCMILLIN
HARMON PHILLIPS & UPP
301 N.W. 63rd, Suite 600
P.O. Box 26400
Oklahoma City, Oklahoma 73126
(405) 840-2731

Attorneys for Principal

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, Surety

By: _____

Attorney in Fact

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 83-C-535-C
Consolidated

TANK TRUCKS, INC., a corporation,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLY,
Defendants.

CHARLES O. BELL, JR.,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLEY,
Defendants.

[Filed June 21, 1983]

NOTICE OF FILING PETITION FOR REMOVAL

TO: TANK TRUCKS, INC., and CHARLES O. BELL, JR., through:

Stipe, Gossett, Stipe, Harper, Estes
McCune & Parks
P. O. Box 1368
McAlester, OK 74502

Mr. Richard Gibbon
Gibbon, Gladd, Taylor, Smith & Hickman
1611 South Harvard
Tulsa, Oklahoma 74112

You are hereby notified that Petition for Removal has this day been mailed to Mr. Jack C. Silver, Clerk, United States District Court for the Northern District of Oklahoma, Tulsa, Oklahoma, for filing in the above-entitled case.

DATED this 21st day of June, 1983.

/s/ Grey W. Satterfield
GREY W. SATTERFIELD of

KORNFELD SATTERFIELD MCMILLIN
HARMON PHILLIPS & UPP
301 N.W. 63rd, Suite 600
P.O. Box 26400
Oklahoma City, Oklahoma 73126
(405) 840-2731

Attorneys for Defendant
Burlington Northern Railroad
Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 83-C-535-C
Consolidated

TANK TRUCKS, INC., a corporation,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLY,
Defendants.

CHARLES O. BELL, JR.,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLEY,
Defendants.

[Filed June 21, 1983]

CERTIFICATE

We hereby certify that written Notice of Filing Petition for Removal in the above cases, a true and correct copy of which is attached hereto, has been mailed or delivered to plaintiffs' attorneys, Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks, P. O. Box 1368, McAlester, Oklahoma, 74502; Mr. Richard Gibbon, Gibbon, Gladd, Taylor, Smith & Hickman, 1611 South Harvard,

Tulsa, Oklahoma, 73112, and a true and correct copy of the Petition for Removal has been mailed or delivered to Ms. Bobbie Williams, Court Clerk, Creek County District Court, Sapulpa, Oklahoma, 74066, for filing, on this —— day of June, 1983.

GREY W. SATTERFIELD of

KORNFELD SATTERFIELD MCMILLIN
HARMON PHILLIPS & UPP
301 N.W. 63rd, Suite 600
P.O. Box 26400
Oklahoma City, Oklahoma 73126
(405) 840-2731

Attorneys for Defendant
Burlington Northern Railroad
Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 83-C-535-C
Consolidated
State Court No. C-81-460

TANK TRUCKS, INC., a corporation,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLY,
Defendants.

CHARLES O. BELL, JR.,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation, and SAM H. SCULLEY,
Defendants.

[Filed Mar. 27, 1983]

ORDER

Now before the Court for its consideration is the Motion of the defendant Burlington Northern Railroad Company to declare "null and void" the verdicts and judgments entered in case numbers C-81-347 and C-81-460 (consolidated), in the District Court of Creek County, Oklahoma, on June 21, 1983, after the case had been removed by defendant Burlington Northern to this Court.

The defendant has also moved for an injunction to prevent plaintiff Charles O. Bell, Jr. and his attorneys and plaintiff Tank Trucks, Inc., its agents, servants, employees, and attorneys from proceeding further in the state court action until further order of this Court. Plaintiffs Charles O. Bell, Jr. and Tank Trucks, Inc. have filed motions to remand this action to state court.

It is the position of defendant Burlington Northern that when the state court judge sustained the demurrer of Sam Scully, the non-diverse party, immediately prior to instructing the jury, and the plaintiffs failed to object, removal to federal court became permissible. Plaintiff Bell contends that refraining from opposing a demurrer is not the equivalent of a voluntary dismissal.

It is the position of defendant Tank Trucks that its lawsuit was joined with the claim of Charles O. Bell as a matter of convenience for the purposes of trial only. Therefore, since there was no joint suit in state court, any statements or actions by counsel for Bell cannot be attributed to Tank Trucks and removal would be improper. Tank Trucks also argues that since Burlington Northern took its counterclaim against Tank Trucks to the jury in the state court action, that it waived its right to removal.

No transcription as of the proceedings in chambers was made wherein the state court judge discussed with the parties the matter of sustaining the defendants' demurrer as to defendant Sam Scully. At page 13 of the Partial Transcripts submitted to the Court on July 20, 1983, the state court judge stated as follows:

> THE COURT: Okay. At this time the Court, as we have talked earlier in chambers, will sustain the demurrer as to Sam Scully, let him out, and we have agreed on the Instruction that would cover that. We did that this morning. . . .

Whether attorneys for both plaintiffs agreed to the judge's ruling on the demurrer is unclear under the record as it stands before this Court. It is clear that all parties understood that the ruling of the court went to the merits of plaintiffs' claims against Scully, including the attorney for the defendant, Burlington Northern, Mr. Satterfield:

> MR. SATTERFIELD: With the Court having dismissed Sam Scully, the Court will be prohibited from considering any negligence on his part as being negligence against the railroad because the Court has made a judicial determination that there was no negligence on his part, no showing of negligence on his part, in sustaining the demurrer.
>
> THE COURT: Should that be mentioned or not?
>
> MR. PARKS: I don't think it needs to be mentioned. . . . (Tr. 14)

It is clear that "the right of removal from the state courts is statutory. A suit commenced in state court must remain there until cause is shown under some act of Congress for its transfer." *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199, 201, 24 L.Ed. 656 (1877). Federal jurisdiction is to be determined solely by an examination of the plaintiff's case, without recourse to defendant's pleadings. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). It is also well-established that the "voluntary-involuntary" rule requires that a suit remain in state court unless a "voluntary" act of plaintiff brings about a change that renders an action removable. A ruling by a court on the merits and *in invitum* which removes a resident defendant is clearly an involuntary as to plaintiff and prevents a cause from being removed from state court. *Kansas City Suburban Belt Ry. Co.* v. *Herman*, 187 U.S. 63, 23 S.Ct. 24, 47 L.Ed. 76 (1902); *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 215 U.S.

246, 30 S.Ct. 76, 54 L.Ed. 177 (1909). In the *Kansas City Suburban Belt Ry Co.* case, a state judgment for a resident defendant on a demurrer to the evidence was held to bar removal to federal court since it was "on the merits" and "in invitum".

In the action herein, as in *Kansas City Suburban Belt Ry. Co.* and *Lathrop, Shea & Henwood Co.*, *supra*, the plaintiffs insisted on the individual liability of Sam Scully until the close of trial, and the state court judge affirmed their right to proceed against him by overruling all demurrers of defendants to the evidence prior to instructing the jury as to the law. Only upon an unrecorded in-chambers discussion near the close of trial, did the state court judge decide that allowing defendant Scully to remain in the case as an individual would unreasonably confuse the jury. The judge reported after the in-chambers conference that he had sustained the demurrer as to Scully, and that any agreement between the parties pertained to the instruction covering the effect of the demurrer on the remaining action. (Tr. 13, 15). The court also deferred objections to instructions until after the jury went out to deliberate. (Tr. 13). The subsequent recollection of the judge and participating attorneys of the in-chambers discussion varies. Mr. Gossett, attorney for plaintiff Bell, said: "The fact is that they demurred, we did not object to the demurrer being sustained, but there has been no finding by the Court." (Tr. 17). Mr. Gossett recalled that Mr. Gibbon, attorney for plaintiff Tank Trucks concurred in the statement that they had no objection to the demurrer (Tr. 17-18). Mr. Parks, attorney for plaintiff Bell, stated: "Well, the way I understand it, the Judge just didn't want to submit the issue of Scully's liability to the jury, so the easy way to do that was just for the record to sustain the demurrer." (Tr. 17). Mr. Gibbon stated: "I think that it was all in a discussion as to trying to work out as smooth of an instruction to the jury, and you all was the one that wanted him out of there." (Tr.

18). Whereupon the following conversation ensued between the judge and the parties:

> THE COURT: Mr. Wagner, if I can. We talked a little bit and you all had moved that he get out, and I was trying to find a way to get him out as an individual. If you feel that there is some problem with what we have done, over the lunch hour, you all think about it. I think the jury understood when I said individually that there would be nothing returned—
>
> MR. SATTERFIELD: For the time being, let's leave it as it is, and we'll take it up further after lunch.
>
> MR. GIBBON: Maybe we can put him back in after lunch.
>
> THE COURT: I indicated to you that I could leave him in.
>
> MR. SATTERFIELD: Well, see, I didn't realize that Mr. Gibbon had—I don't mean Mr. Gibbon, that Mr. Gossett had told you that they had no objection to him going out. That's a little different. Okay.
>
> THE COURT: Let me know.
>
> (WHEREUPON, a brief lunch recess was taken, after which the following proceedings were had in open court in the presence and hearing of the jury panel, to-wit:)
>
> THE COURT: Let the record show the jury has returned and are seated in the box. Is counsel ready to proceed?
>
> MR. GOSSETT: Yes, Your Honor.
>
> MR. SATTERFIELD: May I approach the bench? Let the record show this case has been removed to the United States District Court for the Northern District of Oklahoma because—

(Tr. 17-18).

Thus the court appears to have opened the ruling on the demurrer to the further argument of all counsel. After lunch on the same day, during which time defendant Burlington Northern had filed its removal action, the parties again discussed with the judge their recollection of the in-chambers discussion as to the demurrer.

> MR. PARKS (for plaintiff Bell): Now, one other thing I'd like to note. The Court granted the demurrer. The Plaintiff did not agree to it, it was an involuntary dismissal. The Court granted it.
>
> MR. SATTERFIELD: We will let the record speak for itself on that score.
>
> MR. WAGNER (for defendants): My understanding of the Judge's statement was that counsel agreed to it back in chambers. Judge, that is not my recollection. My recollection was that you indicated that you either had or would sustain the demurrer and if counsel—Mike, do you recall agreeing to that?
>
> MR. PARKS: I did not agree to it.
>
> THE COURT: *Whatever it was, plaintiffs didn't agree to it.* (emphasis added)
>
> MR. SATTERFIELD: Well, whatever the record shows.
>
> THE COURT: *There was no agreement, just that there would be no objections.* (emphasis added)
>
> MR. GOSSETT: We would not argue it anyway.
>
> THE COURT: And we were working on Instructions to submit so that it would make it clear if that were done. That was my understanding.
>
> MR. SATTERFIELD: Well, we have got that pretty well covered in the record, I think, after the

> Court finished reading the Instructions, Your Honor. That will just be whatever it is. . . . (Tr. 27, 28).

Based on the record submitted to the Court in the action herein, it is the view of the Court that the demurrer to the evidence of defendant Scully which was sustained by the state court was a ruling on the merits and was not in essence a dismissal by agreement of the parties. In addition, the record shows that the state court had reconsidered this ruling immediately prior to removal by defendant Burlington Northern, and had asked for counsel for all parties to advise him after lunch as to their positions on the demurrer. Before this could occur, defendant Burlington Northern took advantage of the apparent confusion to remove the action to this Court.

It is well-established that where doubt exists as to the right of the federal court to entertain jurisdiction of a suit removed from state court, the court should remand the suit to state court. *Graves* v. *Corbin*, 132 U.S. 571, 10 S.Ct. 196, 33 L.Ed. 462 (1890); *Greenshields* v. *Warren Petroleum Corp.*, 248 F.2d 61 (10th Cir. 1957); *Dane* v. *Southwestern Bell Telephone Co.*, 352 F. Supp. 257 (W.D. Okl. 1972). In *Dane*, the court also noted that in addition to looking at the allegation of plaintiffs' state court petition, aided as necessary by defendants' Petition for Removal, "In determining jurisdiction on removal, the Court may delve deeply into the factual situation surrounding jurisdictional matters. . . ." *Id.*, 258-59.

Having inquired as fully as possible into the record and affidavits supplied by the parties, and fully considering the pleadings filed herein, the Court retains considerable doubt as to whether this action was properly removed.

It is therefore the order of the Court that the action herein was removed improvidently and without jurisdiction. It is the further order of the Court that the action

herein should be and hereby is remanded to the District Court of Creek County, State of Oklahoma, Sapulpa Division for further proceedings if such are deemed appropriate, pursuant to 28 U.S.C. Section 1447(c).

It is so Ordered this 27th day of March, 1984.

/s/ H. Dale Cook
H. DALE COOK
Chief Judge, U.S. District Court

Excerpts of the Transcript of the Record from the District Court in and for Creek County, State of Oklahoma in *Charles O. Bell, Jr. and Tank Trucks, Inc. v. Burlington Northern Railroad and Sam Scully*, June 21, 1983, pages 1336, line 13 to 1344, line 2.

• • • •

[1336] (WHEREUPON, the proceedings of June 20th, 1983, were concluded, and the following proceedings were had on June 21st, 1983, at the bench, outside the hearing of the jury panel, to-wit:)

THE COURT: Gentlemen, I'm handing you a copy of the Instructions and verdict forms that we plan to use. I know that you don't necessarily all agree with them, but we're going to read these and since they have been settled as well as they're going to be settled, and these are the Instructions that I'm going to give. These are the Instructions that I'm going to give and we have all agreed that all objections can be raised and the record perfected after the jury goes out to deliberate.

[1337] MR. SATTERFIELD: That's correct.

MR. PARKS: That's correct.

THE COURT: Is there anything else?

MR. SATTERFIELD: I would move to conform the evidence to—to conform the pleadings to the proof on behalf of Defendants Burlington Northern and Sam Scully.

THE COURT: Okay. At this time the Court, as we have talked earlier in chambers, will sustain the demurrer as to Sam Scully, let him out, and we have agreed on the Instruction that would cover that. We did that this morning. I don't know the agency Instruction—

MR. WAGNER: Give the general agency Instruction specifically not naming any particular employee of the railroad.

THE COURT: We agreed to submit it as to Burlington Northern. Is that agreeable or not?

MR. SATTERFIELD: That general instruction is agreeable. With the Court having dismissed Sam Scully, the Court will be prohibited from considering any negligence on his part as being negligence against the railroad because the Court has made a judicial determination that there was no negligence on his part, no showing of negligence on his part, in sustaining the demurrer.

THE COURT: Should that be mentioned or not?

MR. PARKS: I don't think it needs to be mentioned.

[1338] THE COURT: But if it's going to be mentioned, I'm going to mention it. Let's just decide right now whether it needs to be mentioned or not.

MR. SATTERFIELD: I really think it's vital because they have made these claims against Sam Scully. I think it's very important that the jury be told they can't consider any negligence on the part of Sam Scully.

THE COURT: Okay. I'll mention that briefly and we'll go on. The record will not be made on reading Instructions.

MR. SATTERFIELD: One other thing. I probably ought to make my record a little clearer on my motion to conform the proof to the pleadings. That would be particularly with respect to the issue of sudden emergency.

THE COURT: Okay. We have all agreed on verdict forms, and one thing we didn't do as to Tank Trucks, we all know that we're going to let the percentages if anything, if they compare, apply to the Tank Truck verdict also, and I'm going to explain those a little bit to the jury. I'm going to go through these Instructions. We have been pressed for time and you're going to find in here—and I want you to follow along with me. Where it says—some of these are forms out of the Ouji book. I'm going to mark through where it says Plaintiff and in parenthesis name. I'm going to make some deletions as I read through them and it's up to you to follow me. It's just a matter as to form. If you follow any mistakes, approach the [1339] bench.

MR. SATTERFIELD: Another thing, a ruling on my motion to conform the pleadings to proof.

THE COURT: That will be allowed.

MR. SATTERFIELD: Okay.

(WHEREUPON, the following proceedings were had in open court, in the presence and hearing of the jury panel, to-wit:)

THE COURT: Ladies and gentlemen, let me explain this to you rather than Counsel through closing arguments. The conductor of the train, Mr. Sam Scully, was mentioned when we started this lawsuit and was named as a Defendant. I have sustained a demurrer and allowed him out of this lawsuit insofar as individual liability goes. We have an Instruction that's been agreed by Counsel and they can comment on that later, and after I read it to you that's in here, that essentially that the action of the employees are taken in law as the actions of Burlington Northern, okay? So that's why you may find a discrepancy, but Mr. Scully is no longer listed as an individual Defendant.

Now, as we get started, if you can't hear me, raise your hand and get my attention, and Counsel is going to be following along. If we have made any mistakes, let me know, Gentlemen.

(WHEREUPON, the Instructions were read to the jury, [1340] but no record made by the reporter, and after the Instructions were read to the jury, the jury panel was excused for lunch, after which the following proceedings were had between the Court and Counsel, to-wit:)

MR. SATTERFIELD: Your Honor, before we proceed with the arguments, we have got something misleading in these Instructions.

THE COURT: What have we done?

MR. SATTERFIELD: I alluded to it briefly at the bench before you read the Instructions. You have sustained my demurrer as to Sam Scully finding as a matter of law, that no recovery can be had as to him, yet there are general Instructions here that say that the train crew are the agents of the railroad, and they can consider their negligence. Now, that's misleading and I think it's imperative that the Court tell the jury, in so many words, that—or allow Counsel to do it—that Sam Scully has been released as a matter of law and that his negligence can't be considered.

MR. STIPE: That's right.

MR. WAGNER: I think that was our understanding in chambers, Your Honor, that we would give the general Instruction but that that would be made clear to the jury that no negligence on behalf of Sam Scully could be considered. I believe we discussed that earlier.

MR. GOSSETT: I don't think there has been any [1341] determination by the Court of a factual situation. The fact is that they demurred, we did not object to the demurrer being sustained, but there has been no finding by the Court.

MR. SATTERFIELD: All right. You did not object to the demurrer being sustained?

MR. GOSSETT: That's correct.

MR. STIPE: That doesn't mean that we agree that he wasn't negligent, though.

MR. GOSSETT: We announced to the Court we had no objection to the demurrer being sustained.

MR. SATTERFIELD: Okay. Now, I didn't understand that.

MR. STIPE: It goes out by agreement; isn't that—

MR. GOSSETT: Well, I don't say by agreement, but isn't that the way that it went?

MR. PARKS: Well, the way I understand it, the Judge just didn't want to submit the issue of Scully's liability to the jury, so the easy way to do that was just for the record to sustain the demurrer.

MR. GOSSETT: I don't know if you were present, but I told the Court at one point and I think Mr. Gib-

bon did, that we had no objection to the demurrer being sustained.

MR. GIBBON: I think that was all in a discussion as to trying to work out as smooth of an instruction to the jury, and you all was the one that wanted him out of there.

THE COURT: Mr. Wagner, if I can. We talked a little [1342] bit and you all had moved that he get out, and I was trying to find a way to get him out as an individual. If you feel that there is some problem with what we have done, over the lunch hour, you all think about it. I think the jury understood when I said individually that there would be nothing returned—

MR. SATTERFIELD: For the time being, let's leave it as it is, and we'll take it up further after lunch.

MR. GIBBON: Maybe we can put him back in after lunch.

THE COURT: I indicated to you that I could leave him in.

MR. SATTERFIELD: Well, see, I didn't realize that Mr. Gibbon had—I didn't mean Mr. Gibbon, that Mr. Gossett had told you that they had no objection to him going out. That's a little different. Okay.

THE COURT: Let me know.

(WHEREUPON, a brief lunch recess was taken, after which the following proceedings were had in open court in the presence and hearing of the jury panel, to-wit:)

THE COURT: Let the record show the jury has returned and are seated in the box. Is Counsel ready to proceed?

MR. GOSSET. Yes, Your Honor.

MR. SATTERFIELD: May I approach the bench? Let the record show this case has been removed to the United States District Court for the Northern District of Oklahoma because—

MR. GOSSETT: Your Honor, may we approach the bench?

[1343] THE COURT: For what purpose?

MR. GOSSETT: In connection with his motion. It's being done in the hearing of the jury and I would prefer the Court hear the motion at the bench.

MR. SATTERFIELD: I will be glad to do it anywhere the Court desires, Your Honor.

THE COURT: We can hear a motion after this jury gets back through deliberating, can't we?

MR. GOSSETT: Yes, I think so.

THE COURT: We have been here seven days and I don't need to hear anymore motions.

MR. SATTERFIELD: All right. I know it. The thing I need to point out to the Court is that under the terms of 28 U.S. Code Annotated, Section 1446E, the Court has lost jurisdiction.

THE COURT: Let's hear everything after lunch, if we can. I mean, after this jury gets back.

MR. SATTERFIELD: I have to tell Your Honor—

THE COURT: You don't have to tell me nothing. All you have to do is turn around and make your closing argument to that jury and that's good enough.

MR. SATTERFIELD: All right. Is Your Honor instructing me to proceed in this case?

THE COURT: I'm instructing you to make your closing argument when it's time to make your closing argument.

[1344] MR. SATTERFIELD: I understand, Your Honor. Based on the record previously made, I'll comply.

• • • •

SUPREME COURT OF THE UNITED STATES

No. A-577

BURLINGTON NORTHERN RAILROAD COMPANY,
Applicant,

v.

CHARLES O. BELL, JR., *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 13, 1987.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 9th day of February, 1987.

OPPOSITION

BRIEF

No. 86-1475

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

CHARLES O. BELL, JR. and TANK TRUCKS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

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RESPONDENTS' BRIEF IN OPPOSITION

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May 6, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

When a defendant, at the conclusion of the evidence in a seven-day personal injury trial and immediately prior to final arguments to the jury, files a baseless petition for removal to federal court, is the state trial court barred from receiving the jury's verdict and suspending entry of the judgment until the case is remanded from the federal court or is it forced instead to declare a mistrial?

STATEMENT WITH RESPECT TO CORPORATE SUBSIDIARIES AND AFFILIATES

Undersigned counsel certifies that respondent, Tank Trucks, Inc., has no corporate parents, subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

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IN THE

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises out of petitioner's eleventh-hour effort to abort a jury trial that had not gone well for it by filing a baseless petition for removal to federal court immediately prior to closing arguments to the jury. Instead of declaring a mistrial, the state court preserved the resources devoted to the seven-day trial by directing the parties to give their closing arguments and then receiving the jury's verdict. The court did not, however, enter judgment on the verdict until after the federal court, finding that the action had been removed "improvidently and without jurisdiction," remanded the case to the state court.

The underlying negligence action arose out of a collision in which a truck driven by respondent Charles O. Bell, Jr. and owned by respondent Tank Trucks, Inc. was struck at a railroad crossing in Creek County, Oklahoma by a railroad engine owned and operated by petitioner Burlington Northern Railroad Company. The conductor of the engine, Sam Scully, permitted the engine to travel backwards, at a high rate of speed, and failed to require the sounding of the train's whistle, bell, or horn as it approached the crossing—all in violation of Burlington's safety rules. As a result of the collision, respondent Bell, who was then 27 years old, suffered the loss of his right leg at the knee, a fused left leg, a practically useless right arm, and permanent disability.

Respondents, both Oklahoma residents, filed separate suits for negligence in Oklahoma state court, naming both Scully, an Oklahoma resident, and Burlington, a Delaware corporation with its principal place of business in Minnesota. On motion of the defendants, the two suits were consolidated. Early in the proceedings, Burlington petitioned for removal to the United States District Court for the Northern District of Oklahoma, alleging that there was no evidence of negligence against Scully, the resident defendant, and that he had been fraudulently joined to defeat the diversity jurisdiction of the federal court. The federal court rejected this contention and remanded the case to the Oklahoma trial court.

After nearly 21 months of pretrial activities and discovery, the case proceeded to a jury trial that extended from June 13 to June 21, 1983. At the close of the plaintiffs' case, and again at the close of all of the evidence, defendants' counsel demurred to the evidence against the train conductor, Scully, and moved to dismiss him from the action. On both occasions, respondents objected and the motions were denied. *See* App. 6a.

During the morning of June 21, after all of the evidence had been received, the court met with counsel in chambers to discuss jury instructions.[1] During this discussion, the trial judge expressed his view that the liability of defendant Scully, the train conductor, was the liability of the railroad and that it might therefore simplify matters for the jury if the court sustained Scully's demurrer. The court offered the defendants the choice of either submitting Scully's liability to the jury or sustaining his demurrer; the defendants chose the latter course and Scully's demurrer was sustained. At the same conference, the parties agreed on a general agency instruction providing that the authorized acts of employees could be imputed to the railroad. *See* App. 3a to 12a, *see also* Pet. App. 6a.

Before and after the jury was instructed and released for a lunch break, the court and counsel had further conferences regarding the demurrer and related instructions. Pet. App. 42a-46a. Despite having previously agreed to a vicarious liability instruction that would have permitted the jury to consider any evidence of an employee's negligence in assessing the conduct of the railroad, petitioner's attorneys now demanded that the jury be advised that the court, by sustaining the demurrer, had "made a judicial determination that there was no negligence on [Scully's] part." Pet. App. 43a. Respondents, who had twice before successfully opposed Scully's demurrer, objected, making clear that they had not agreed to any determination that Scully had no liability. Rather, in an effort "to work out as smooth of an instruction to the jury" as possible in light of the court's

[1] In Oklahoma, the jury is instructed prior to closing arguments. Although the chambers' conference was not recorded by the court reporter, later in the day those present, including the trial judge, described their recollections of what had transpired. Portions of the transcript of this proceeding are set forth in the Appendix.

inclination to dismiss Scully from the case, counsel for respondents explained that they had acquiesced in the dismissal without agreeing that Scully was not negligent. *See* Pet. App. 45a-46a.

In the face of this dispute over the nature of Scully's dismissal and its consequences for the instructions, the court stated: "If you feel that there is some problem with what we have done, over the lunch hour, you all think about it." Pet. App. 46a. As the court began to continue the discussion, counsel for the railroad interrupted and stated: "For the time being, let's leave it as it is, *and we'll take it up further after lunch.*" *Id.* (emphasis added). Significantly, the last statement made at this conference by counsel for either plaintiff was: "Maybe we can put him [Scully] back in after lunch." *Id.*

Having induced the court to postpone the resolution of this controversy and having heard plaintiff's counsel refer to the possibility of putting Scully back in the case, petitioner proceeded during the lunch break to file its second petition for removal of the action to the United States District Court for the Northern District of Oklahoma, claiming that counsel for plaintiff Bell had made statements that, in effect, voluntarily dismissed defendant Scully from the case. *See* Pet. App. 26a.

At the end of the lunch recess, with the jury in the box, petitioner's counsel announced that a petition for removal had been filed during the break and contended that the state court had lost jurisdiction. The court, noting that the trial had already lasted seven days, directed the parties to give their closing arguments and, despite his claim that the court had no jurisdiction, petitioner's counsel complied. Pet. App. 47a. In fact, petitioner's counsel submitted the railroad's counterclaim against respondent Tank Trucks, Inc. to the jury. *See*

Pet. App. 35a. At the conclusion of its deliberations later that same afternoon, the jury returned verdicts which, taking their comparative negligence findings into account, awarded respondent Bell $872,481.60 and respondent Tank Trucks, Inc. $27,200.00. The trial court received the verdicts, ordered them filed, and then excused the jury and the parties. App. 14a. It did not enter its judgment on the verdicts until after the case was remanded from federal court.[2]

Petitioner thereafter filed a motion in the federal court seeking an order declaring the verdicts null and void and respondents filed a motion to remand the case to state court. On March 27, 1984, the federal court granted respondents' motion to remand, without voiding the verdicts. After a careful review of the record, the federal court summarized the critical events as follows:

> Based on the record submitted to the Court in the action herein, it is the view of the Court that the demurrer to the evidence of defendant Scully which was sustained by the state court was a ruling on the merits and was not in essence a dismissal by agreement of the parties. In addition, the record shows that the state court had reconsidered this ruling immediately prior to removal by defendant Burlington Northern, and had asked for counsel for all parties to advise him after lunch as to their positions on the

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[2] While the jury was deliberating, the court had permitted the parties to make a record of the objections they had previously made to the instructions and rejected petitioner's motion for a mistrial based on closing arguments. *See* App. 1a-3a. Apart from the clerk's routine entry recording the verdicts, no substantive actions—by way of hearings, orders, or entry of judgment—occurred in the state trial court after the verdicts were received and before the remand. While the removal petition was still pending, petitioner filed a "protective" appeal in state court that was dismissed without objection as premature because of the pendency in the trial court of respondents' motion for a new trial with respect to defendant Scully.

> demurrer. Burlington Northern took advantage of the apparent confusion to remove the action to this Court.

Pet. App. 40a. The court concluded that the action had been "removed improvidently and without jurisdiction." *Id.*[3]

After the action was remanded, the state court denied respondents' motion for a new trial with respect to the railroad conductor, which had been held in abeyance pending the decision of the federal court. Then, on June 26, 1984—three months after the remand—the court entered judgment on the verdicts that had been received more than a year earlier. On appeal, the Oklahoma Court of Appeals affirmed the judgment. The Court of Appeals denied Burlington's petition for rehearing and the Oklahoma Supreme Court denied its petition for certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FOLLOWED THE AUTHORITATIVE RULING OF THIS COURT AND DOES NOT WARRANT FURTHER REVIEW.

In rejecting petitioner's effort to use an improvident petition for removal as a vehicle for avoiding an adverse verdict and forcing a mistrial, the Oklahoma Court of Appeals correctly followed this Court's authoritative decision in *Metropolitan Casualty Ins. Co.* v. *Stevens*, 312 U.S. 563 (1941). In that case, the Court squarely held that proceedings in a state court subsequent to the filing of a petition for removal are void if the action is prop-

[3] In view of this conclusion, the court had no occasion to consider the contentions of respondent Tank Trucks, Inc. that removal was, in any event, improper as to that party because (1) unlike counsel for Bell, counsel for Tank Trucks, Inc. had made no statements suggesting his client acquiesced in the dismissal of Sam Scully and (2) the railroad had submitted its counterclaim against Tank Trucks, Inc. to the jury and thus waived its right to removal as to that party. *See* Pet. App. 35a.

erly removable but are valid if the case was not in fact removable and is subsequently remanded. *Id.* at 566. *See also Yankaus* v. *Feltenstein*, 244 U.S. 127 (1917); *Virginia* v. *Rives*, 100 U.S. 313 (1879). Petitioner has offered no persuasive reason why this sensible rule should be reexamined in the peculiar factual context of this case.

The effect of the rule announced in *Metropolitan Casualty* is to preserve the authority of the federal court, while deterring the filing of removal petitions for tactical purposes and permitting state court actions to resume smoothly in the event of a remand. Upon the filing of a petition for removal that it views as without basis, a state court can, in order to preserve its resources and protect its jurisdiction, "proceed at its peril"—that is, conduct proceedings whose validity is conditional upon a remand from the federal court. The defendant can continue to contest the state court action on the merits—thereby protecting himself in the event of a remand—while preserving his claim that the action is properly removable. *See* 312 U.S. at 568.

Petitioner argues, in essence, that Congress silently overruled *Metropolitan Casualty* and other decisions of this Court to the same effect when it amended the removal statutes as part of a comprehensive revision of the Judicial Code in 1948. *See* Pet. 10. This contention is not, however, supported by the language or the legislative history of those amendments. Prior to 1948, the effect of removal on further state proceedings was governed by 28 U.S.C. § 72, which provided that, upon the filing of a petition setting forth grounds for removal, "[i]t shall be the duty of the state court to accept said petition [of removal] and bond and *proceed no further in such suit*" (emphasis added). As part of a simplification of the removal statutes and the procedures they required, Congress consolidated parts of former sections 72, 74 and 76—including the "proceed no further" command of § 72—into new section 1446(e). *See* Revision Notes, 1948 Act, *reprinted following* 28 U.S.C. § 1446(e).

That section now provides that, upon proper filing and notice of a removal petition, "the State court shall *proceed no further* unless and until the case is remanded" (emphasis added).[4] The "proceed no further" clause is, of course, precisely the same as that contained in the predecessor statute in force when the Court decided *Metropolitan Casualty*. There is no apparent reason why the words "proceed no further" should mean something different in the new statute than they did in its predecessors—and petitioner cites nothing in the legislative history of the 1948 Act that suggests that they do.[5] To the contrary, the revisers' notes state that the relevant portion of section 1446(e) "is derived from sections 72, 74

[4] In 1949, while revising § 1446(e) to make clear that notice of removal may be given shortly after filing, Congress introduced the phrase "and until" into the statute without comment in its reports on the significance of the addition, if any. *See* H.R. Rep. No. 352, 81st Cong., 1st Sess., *reprinted in* 1949 *U.S. Code Cong. Serv.* 1254, 1268; S.Rep. No. 303, 81st Cong., 1st Sess., *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248, 1253-54; Revision Notes, 1949 Act *reprinted following* 28 U.S.C. § 1446. Given this Court's decision in *Metropolitan Casualty* only a few years earlier, Congress's addition of the phrase "unless and until the case is remanded" was probably meant simply to make clear that, after a remand but not before, the state court could proceed without the risk that its actions might be voided by the federal court. *See* Pet. App. 9a-10a. If, instead, the addition of this phrase were intended to overrule several decisions of this Court and change the standing interpretation of the words "proceed no further," one would expect to find clear evidence of that intention in the legislative history.

[5] The court in *South Carolina* v. *Moore*, 447 F.2d 1067, 1072-74 (4th Cir. 1971), which concluded that the 1948 amendments did in fact reverse the premise of the "proceed at peril" rule, acknowledged that, during consideration of the revisions, neither the Judicial Conference of the United States, the Revisers, witnesses testifying before congressional committees, nor scholarly commentators "seemed to have focused attention upon the effect of the new procedure upon the [*Metropolitan Casualty*] rule, and we have been unable to find anything in the legislative history of § 1446 which is illuminating." *Id.* at 1073.

and 76 of title 28, U.S.C. 1940 ed." and give no indication whatsoever that any substantive change in the law with respect to interim state proceedings was intended. *See* Revision Notes, 1948 Act, *reprinted following* 18 U.S.C. § 1446.

The 1948 revisions did, as petitioner points out, significantly change the procedures for removal. *See* Pet. 10-11. Under prior practice, petitions in certain kinds of actions, including federal question and diversity cases, were to be filed in state court, where the case could remain if the court found it was not removable and the defendant failed to seek the intervention of the federal court. *See Metropolitan Casualty*, 312 U.S. at 567.[6] As a result of the 1948 revisions, all removal petitions must now be filed in federal court, *see* 28 U.S.C. § 1446(a), and the state court is therefore no longer required to make a formal determination of whether the case is properly removable. Petitioner contends that the effect of these changes is to lodge "controlling authority with respect to removal" in the federal courts, where removal is effective upon filing, and that state courts are no longer "well situated to evaluate removability and to balance the risks of conducting duplicative proceedings against the benefits of continuing [their] proceedings after a removal . . . ." Pet. 11.

The contrast between current procedures and those in effect when the "proceed at peril" rule was developed is not, however, as stark as petitioner would suggest. Under the prior statutes, when a state court was presented with a properly filed and verified petition that "exhibited a sufficient ground for removal," the case was "in legal effect thus removed." *See Virginia* v. *Rives*, 100 U.S. at 316-17. The state court was required to cease proceedings and, if it did not, its subsequent actions were

[6] Under those circumstances, the question of removability remained a federal one subject to review by this Court after a final judgment by the state's highest court. *See* 312 U.S. at 567.

"absolutely void." *See id.* Furthermore, the defendant had the right, regardless of the state court's actions, to docket the case in federal court, which could—then, as now—enjoin further state court proceedings. *See* 1A J. Moore & B. Ringle, *Moore's Federal Practice* §§ 0.168 [2] and 0.168[3.-4-8] at 533-36, 631 (1986); *see also Metropolitan Casualty*, 312 U.S. at 567-68. Thus, while state courts could act on their view of the validity of removal petitions, the federal courts retained "controlling authority" over that question as they do today. Conversely, although state courts today no longer receive removal petitions, there is no reason to believe that they have become any less capable of "balanc[ing] the risks of conducting duplicative proceedings against the benefits of continuing [their] proceedings after a removal," Pet. 11 —recognizing that, as has always been the case, they risk nullification of their actions by the federal court if they are mistaken.[7]

Petitioner correctly notes that a number of courts and commentators have nevertheless concluded that the 1948 amendments to the removal statutes effectively overruled the decision in *Metropolitan Casualty*. Pet. 10-13. For the most part, however, the opinions cited by petitioner express this conclusion in contexts very different from that presented by this case. For example, in many of the decisions cited by petitioner for the proposition that "*any* state court proceedings after removal, but before remand, are absolutely void," Pet. 12 (emphasis in original; footnote omitted), the case was not, in fact, remanded.[8] Not-

[7] Indeed, in a case like this one where removability turns on the consequences under state law of the trial court's own ruling, the state court is in the best position to judge whether the case has been properly removed.

[8] *Murray* v. *Ford Motor Co.*, 770 F.2d 461, 462-63 (5th Cir. 1985); *Syntex Ophthalmics, Inc.* v. *Novicky*, 745 F.2d 1423, 1430 (Fed. Cir. 1984), *cert. granted and judgment vacated on other grounds*, 470 U.S. 1047 (1985); *Parker* v. *Brown*, 570 F. Supp. 640, 643 (S.D. Ohio 1983); *Heniford* v. *Am. Motors Sales Corp.*, 471 F. Supp. 328, 338 (D.S.C. 1979), *dismissed mem.*, 622 F.2d 584 (4th Cir. 1980); *Master Equip., Inc.* v. *Home Ins. Co.*, 342 F. Supp. 549, 551 (E.D. Pa. 1972); *State ex rel. Lyons* v. *Lake Superior Court*, 259 Ind. 217, 285 N.E. 2d 642, 643 (1972).

withstanding the broad language in some of these opinions, they are, to the extent they hold state proceedings in unremanded cases void, perfectly consistent with the decision below and the rule in *Metropolitan Casualty*.

Nor do many of the remaining decisions cited by petitioner involve the highly unusual circumstances presented by this case. In most of those decisions, the interim "proceedings" declared void, notwithstanding a subsequent remand, consisted of orders, decrees, judgments, convictions or similar determinative actions by the state court.[9] These types of actions may require immediate compliance, establish deadlines, or have other irrevocable effects; their prejudicial effects on the removing party might therefore persist independent of whether the case is concluded in state or federal court. *Cf. Master Equip., Inc.* v. *Home Ins. Co.*, 342 F. Supp. 549, 552 (E.D. Pa. 1972) (approving state court's striking of default judgment after removal because of potential collateral consequences of leaving judgment on the books). An interim state court decision of that kind plainly presents a far stronger claim for departure from the *Metropolitan Casualty* rule than does the decision of a state court to conclude the last few hours of a lengthy jury trial, with the full participation of the removing party, while suspending any action or de-

[9] *See City of Lake Charles* v. *Bell*, 347 So. 2d 494, 495 (1977) (contempt order against counsel); *Cavanagh* v. *Cavanagh*, 119 R.I. 479, 380 A.2d 964, 966 (1977) (real estate orders); *Davis* v. *Davis*, 267 S.C. 508, 229 S.E. 2d 847, 848 (1976) (nonsuit and temporary injunctive relief); *Fossey* v. *State*, 254 Ind. 173, 258 N.E. 2d 616, 617 (1970) (criminal trial and conviction); *Hopson* v. *North Am. Ins. Co.*, 71 Idaho 461, 233 P.2d 799, 799-802 (1951) (order and entry of default).

cision by the court with respect to the verdict pending a remand.[10] In the latter circumstances, the removing defendant suffers no conceivable prejudice from the interim proceedings.[11]

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[10] *See also* Pet. 14 (suggesting that two of the decisions relied upon below are inapposite because "the state court orders under attack had been issued *after the remand* of the case by the federal court") (emphasis in original). Even in those few cases cited by petitioner in which the court, after remand, declared void interim state proceedings that might not be fairly characterized as orders or judgments, the petition for removal was filed *prior* to the beginning of trial and not, as here, near the trial's conclusion. *See Mississippi Power Co.* v. *Luter*, 336 So. 2d 753, 755 (Miss. 1976) (action removed day before jury was impaneled and trial began); *People* v. *Wynn*, 73 Mich. App. 713, 253 N.W. 2d 123, 124 (1977) (petition filed before criminal trial and conviction); *City of Lake Charles* v. *Bell*, *supra*, 347 So. 2d at 495, 496 n.1 (addressing interim contempt order; petition filed hours before trial, criminal convictions prior to remand not at issue); *Fossey* v. *State*, *supra*, 258 N.E. 2d at 617 (criminal case, petition apparently filed prior to trial).

As petitioner acknowledges, the statements made in two of the cases it cites are dicta because the petition to remove had not been perfected at the time of the interim state proceedings. *See Kaplan* v. *Missouri Pac. R.R.*, 447 So. 2d 489, 494 (La. Ct. App.), *cert. denied*, 449 So. 2d 1345 (La. 1984); *Crown Constr. Co.* v. *Newfoundland Am. Ins. Co.*, 429 Pa. 119, 239 A.2d 452, 456 (1968). And, in one case cited by petitioner, *Laguna Village, Inc.* v. *Laborers Int'l Union*, 35 Cal. 3d 174, 197 Cal. Rptr. 99, 672 P.2d 882, 885 (1983), the court was concerned with the effect on a subsequently remanded case of interim *federal*, not state, proceedings.

[11] In this and other respects, the opinion in *South Carolina* v. *Moore*, 447 F.2d at 1073, concluding that the 1948 revisions reversed the premise of the "proceed at peril" rule, arose in a context very different from that presented here. In that case, a defendant in a criminal prosecution petitioned for removal *prior* to the commencement of trial. Indeed, under the statute then in effect, a criminal case could not be removed after trial had begun. *See id.* at 1074; *see also* 28 U.S.C. § 1446(c)(1) (current statute requiring removal of criminal case before trial unless federal court finds good cause for filing later). Furthermore, despite the fact that the trial had not begun at the time the petition was filed, the state court pro-

Indeed, while it may well be advisable for the state court to suspend its own activities with respect to orders, judgments, and other determinative actions pending the federal court's disposition of a removal petition, as the trial court did here, such an approach cannot sensibly be applied to an ongoing jury trial which, once disrupted while the federal court considers the removal petition, might never realistically be resumed.[12] In the peculiar context of this case, adoption of petitioner's position would have effectively voided not merely the so-called "interim proceedings"—the closing arguments and jury deliberations—but the entire trial that preceded the removal petition.[13] The decision below, which rejected this

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ceeded with the trial and the defendant was *convicted* and *sentenced* —all before the case was remanded. 447 F.2d at 1069.

As petitioner notes, Pet. 9 n.7 & 18-19, Congress apparently recognized the disruption of state criminal proceedings caused by decisions like that in *Moore*—a serious problem identified by the *Moore* court itself. *See* 447 F.2d at 1074. While revising criminal procedures generally six years after that decision, Congress adopted 28 U.S.C. § 1446(c)(3), which explicitly permits a state court to proceed in a criminal case after the filing of a removal petition, "except that a judgment of conviction shall not be entered unless the petition is first denied." In the civil context, where removal petitions can be filed after trial begins, the disruptive effect of an approach like that adopted in *Moore* is, of course, even greater. Indeed, even some of the commentators that have concluded that the 1948 revisions eliminated the "proceed at peril" rule have decried this effect. *See* Pet. 18-19 n.20 (describing views of American Law Institute); 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3737 at 553-554 (2d ed. 1985).

[12] Respondents' motion to remand remained pending in federal court for more than nine months—far longer than the trial court could reasonably have postponed the jury's deliberations.

[13] As the Court of Appeals noted, Congress could not, in amending the removal statute, have intended

> to provide a defendant with a means of halting a lengthy trial just before the case is to be given to the jury, especially if the attempted removal is frivolous, doubtful, in bad faith, or otherwise improper. For to intend such a result is to unneces-

attempt to convert the removal statute into an instrument for obtaining a new trial in state court, does not warrant further review.

II. THE PECULIAR CIRCUMSTANCES OF THIS CASE DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION OF NATIONAL IMPORTANCE.

Petitioner's extravagant claims that the decision below poses serious dangers worthy of this Court's review are belied by its own contention that, with the possible exception of one 1975 decision of the Florida Supreme Court, "there is *not one* other decision, state or federal, upholding under section 1446(e) the validity of substantial state court proceedings taken after removal and prior to remand." Pet. 14 (emphasis in original). Petitioner is reduced to arguing that certiorari should nevertheless be granted because the decision of the Oklahoma Court of Appeals may reflect "simmering" and "latent inclina-tion[s]" of "some state courts." *See* Pet. 15. Petitioner's assertion that the decision below is contrary to "near unanimous" authority, Pet. 8, suggests, however, that state courts have successfully repressed these "simmering" and "latent" impulses.

Respondents freely concede that the decision below, which arose from an extraordinary set of circumstances created by petitioner's unusual tactics, is practically *sui generis*. Faced with a second petition for removal that it clearly viewed as dilatory, *see* Pet. App. 47a, the trial court simply concluded that afternoon's proceedings. Its actions, which caused petitioner no prejudice whatsoever (and which, indeed, would have benefitted petitioner if

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sarily impose an onerous burden on both the federal and state judicial systems, promote great waste of state resources, and oppress hapless litigants by subjecting them to distressing losses of time and money and often deprive parties of justice, all wrought by unwarranted removal delay that can last for months as indeed it did in this case.

Pet. App. 10a.

it had prevailed before the jury), were the absolute minimum necessary to preserve its commitment of scarce state judicial resources against the possibility of a remand. Had the court not received the verdict and then suspended activity pending the remand, it would have had no choice but to declare a mistrial, thereby rewarding petitioner for its baseless petition[14] and nullifying the time and effort invested in the trial by court personnel, the jury, lay and expert witnesses, and the parties. Petitioner offers no reason to doubt that the particular approach the trial court adopted in these unusual circumstances is exceedingly rare. Even if the trial court's actions were incorrect, then, they hardly represent a recurring problem of national importance worthy of this Court's review.[15]

Petitioner contends that it is nonetheless "vital" for the Court to review the virtually unique decision below because the "uncertainty" created by this single prece-

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[14] Each of the lower courts agreed that petitioner's attempt to remove the case was without basis. The trial court itself stated that, whatever the precise nature of its rulings with respect to defendant Scully, "plaintiff's didn't agree to it" and added that "[t]here was no agreement, just that there would be no objections." Pet. App. 39a (emphasis deleted). Similarly, the federal court, after a careful review of the record, found "that the demurrer to the evidence [regarding] defendant Scully which was sustained by the state court was a ruling on the merits and was not in essence a dismissal by agreement of the parties." Pet. App. 40a. The Oklahoma Court of Appeals implied that the removal petition was "frivolous, doubtful, in bad faith, or otherwise improper." *See* Pet. App. 10a.

[15] In addition, the record in this case presents a highly inappropriate vehicle in which to reconsider the rule announced in *Metropolitan Casualty*. The validity of petitioners' last-minute effort to remove the case, which each of the courts below found to be without basis, turns on the significance under Oklahoma law of the trial court's rulings with respect to certain instructions and the demurrer of defendant Scully—rulings made during the course of an unrecorded conference with counsel. The parties remain hotly at odds as to what transpired at that conference. *Compare* pp. 3 to 4, *supra*, *with* Pet. 3-4; *see also* Pet. App. 4a-6a.

dent from an intermediate state appellate court "invites duplication of judicial effort," unfairly "compel[s] removing defendants to proceed in state court notwithstanding the perfection of removal," and risks "disruption of the careful balance between federal and state authorities." Pet. 16-17. The first of these claims is especially ironic in the context of this case. There may be no "waste of scarce judicial resources," Pet. 16, more damaging to the processes of state trial courts than the kind that would result here in the event that petitioner prevails. Petitioner fully participated in an extensive jury trial involving voluminous exhibits and numerous witnesses, including out-of-town experts. The state appellate court has found the trial to be free of error and has affirmed substantial judgments in favor of the plaintiffs. Pet. App. 16a. Through the device of an unfounded removal petition, petitioner seeks, in essence, to repeat this process—forcing the court, witnesses, and parties to undergo a second trial long after the first was completed.

This extraordinary waste of judicial resources cannot be dismissed with the blithe assertion that "[i]n many, if not most, cases removed to federal court, a motion for remand will be unsuccessful." *See* Pet. 16. It is precisely when a removal petition is frivolous and filed for tactical purposes that state courts would, under petitioner's rule, be forced unnecessarily to duplicate their efforts. Nor, contrary to petitioner's suggestions, Pet. 17 n.18, do the minimal safeguards against frivolous petitions provide a meaningful deterrent to such tactics. In this case, for example, a defendant against whom a verdict approaching $1 million was about to be returned filed a petition supported by a bond in the amount of $500. *See* Pet. App. 20a, 28a-29a.

Petitioner's second policy argument in favor of this Court's review of the decision below is that the "proceed at peril" rule unfairly forces non-resident defendants

"unilaterally to proceed in a state forum." Pet. 17. But there is no reason why an out-of-state defendant, certain that the case is properly removable and that the interim state proceedings will therefore be declared void, must devote substantial resources to those proceedings. Furthermore, the Court in *Metropolitan Casualty* held that "participation in subsequent proceedings in the state court is not a waiver of [a removing party's] claim that the cause should have been litigated in the federal court," 312 U.S. at 568. Accordingly, a party with doubt about the propriety of his removal suffers no identifiable prejudice simply by continuing to participate in proceedings that, because the action is properly removed, are later declared void, at least where, as here, no judgment is entered pending remand.[16]

Finally, petitioner contends that the decision below threatens a serious "disruption of the careful balance between federal and state authorities." Pet. 17.[17] It is

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[16] Without relying on an unfounded disrespect for state trial courts, it cannot, of course, be argued that a removing party who participates in interim proceedings pending a remand is "prejudiced" by the very fact of being subjected to the processes of a state court.

Petitioner's expenses, such as they were, in concluding the afternoon's proceedings in state court in this case would admittedly have been wasted in the event that the case had not been remanded and, under either the "proceed at peril" rule or petitioner's approach, a proper removal might have required a new trial in federal court. Precisely because the action was not properly removed, however, petitioner, like everyone else involved—the court, jury, witnesses, and plaintiff—was spared the expense of retrying the entire case in state court.

[17] In support of this argument, petitioner, without any foundation, attributes to state courts a reluctance to "relinquish jurisdiction." Pet. 17. The record in this case supports precisely the opposite proposition. While the jury was deliberating, the trial

difficult to imagine, however, a rule that would foster greater disrespect for or demoralization of state courts than one which would permit out-of-state defendants completely to nullify state court trials by filing improvident, eleventh-hour petitions to the federal court. A state court should be afforded the discretion, under those circumstances, of protecting both its past and its potential future jurisdiction by taking limited steps to preserve the status quo, without prejudice to the parties, pending a remand. Respondents submit that allowing for this degree of discretion promotes, rather than defeats, maintenance of the delicate balance of our federal system.

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court remarked that, if the removal petition in fact required a nullification of the proceedings,

> there are a lot of [other] railroad cases pending over here, and we can send them all over to Tulsa to any judge over there that wants to hear them in the federal building, and they'll all be sent over there, if that's what they're inclined to do, is take them after we spend seven days and work on instructions and get them drawn and then counsel files a Petition for Removal when we're coming back to make closing arguments, after rulings of the Court and evidence has been received, and witnesses sworn, seven days of testimony. The next time when all the other railroad cases—we'll give them to them much earlier, though, so that the federal judges can hear—can spend their seven days hearing them rather than us before we give them to them.

App. 12a-13a. Petitioner's baseless charge that state courts in general (and the trial court in this case in particular) are so jealous of their jurisdiction that they will create inaccurate post-hoc records intended "to undercut the underlying grounds for removal of the case," Pet. 17 & n. 19, is unworthy of a response.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts of the Transcript of the Record from the District Court in and for Creek County, State of Oklahoma in *Charles O. Bell, Jr. and Tank Trucks, Inc. v. Burlington Northern Railroad and Sam Scully*, June 21, 1983, pages 1416 to 1429, 1432 to 1437, and 1449 to 1450.

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[1416] (WHEREUPON, the following proceedings were had between the Court and Counsel while the jury was recessed to deliberate, to-wit:)

THE COURT: We're back on the record. First, let's go into the jury Instructions and settle our record on jury Instructions.

MR. SATTERFIELD: Before we do that, Your Honor, as long as we're talking about the trial itself and before we get on the aspect of the issue of the removal, let me renew my motion for mistrial, for improper conduct of counsel for Tank Trucks in arguing damages of the Plaintiff, Bell.

[1417] THE COURT: I could be wrong, but I didn't hear one.

MR. SATTERFIELD: You didn't get one at the time because I didn't want to interrupt, Your Honor. I'm just trying to clean up my record.

THE COURT: When you say you renew it, you mean you're making a motion now?

MR. SATTERFIELD: Yes, that's fine. I'm moving for mistrial.

THE COURT: If it's proper, I'll overrule it.

MR. SATTERFIELD: And I will make the same motion with respect to the use by Senator Stipe of your leg, your foot, your ankle, what have you. Trying to make the jury identify personally with Plaintiff, I believe, is improper.

MR. GOSSETT: Again, there was no objection at the time.

MR. SATTERFIELD: This is correct. I don't deny that that's the state of the record. I simply thought that this was a more appropriate time to do it rather than interrupt counsel.

THE COURT: It will be overruled.

MR. SATTERFIELD: All right, sir. Now, again—

THE COURT: Let's settle Instructions.

MR. SATTERFIELD: We're ready, Your Honor.

THE COURT: Let's start with Plaintiff. We have got a problem. You have got a copy of the Instructions numbered—

MR. PARKS: Yes, we do, Your Honor. Just to preserve [1418] our record, we would like to note an exception to the Court's refusing to give the requested instructions which we offered which were not given. We would just like to note our exception on each one of those.

MR. SATTERFIELD: Your Honor, can we do the same thing, Your Honor?

THE COURT: Well, wait until I get to you.

MR. SATTERFIELD: Yes, sir.

THE COURT: How do you want to do it?

MR. PARKS: Well, I'll go ahead and just give the numbers. I think I need to dictate the number into the record. I'll do it quickly. We take exceptions to the Court's not giving the following instructions: No. 21, page 21; No. 24, page 24; No. 25, page 25; No. 26, page 26; No. 27, page 27; No. 28, page 28; No. 29, page 29; No. 30, page 30; No. 31, page 31; No. 32, page 32; No. 33, page 33; No. 36, page 36; No. 37, page 37, and that concludes our record on the Instructions for the Plaintiff, Charles Bell, Jr.

THE COURT: Are you sure I didn't give some of those?

MR. PARKS: Yeah, I checked through those, Your Honor. These just have to deal with the Instructions on the special duties that we had discussed in chambers this morning.

THE COURT: Okay. It will be noted. Go ahead if you want to, Mr. Wagner.

[1419] MR. WAGNER: Your Honor, we would take exception to the following Instructions not being given, which were Defendants' requested Instructions: No. 2; 4; 5; 6; 11; 12; 13; 14; 16; 19; 20; 21; 22; 23 on sudden emergency, although there was a sudden emergency instruction given. We would take exception to that particular Instruction being given and not Defendants' Instruction No. 23.

No. 24; No. 25; 26; 27; 28; 29; 31; 32; 33; 35, which is the verdict form; 36; 37; 38; 39; 40; 41; 42; 43; 44; 45 and 46.

THE COURT: Okay. Anything else, as far as the Instructions go?

MR. WAGNER: Yes, Your Honor. On the ones that were given—

THE COURT: Mr. Gibbon, do you have any objections?

MR. GIBBON: No, sir, Your Honor, other than those that were taken—I join in the same ones that the Plaintiffs made a record on.

THE COURT: Okay. Go ahead.

MR. WAGNER: Your Honor, on the Instructions that were given, we would object to Instruction No. 11 having to do with the train crew on the grounds that it doesn't conform with the requested instruction, the Ouji Instruction that we requested.

THE COURT: I thought that's the one you sat back [1420] there and agreed with me. You even had me make some changes.

MR. WAGNER: Your Honor, what happened back there—

THE COURT: Isn't that true, Mr. Parks?

MR. PARKS: Which one was that?

THE COURT: About agency. The train crew.

MR. PARKS: That's right.

THE COURT: Mr. Gibbon, didn't you have some—didn't we all have some say on that back there on that? Look through No. 11 there. Show Mr. Gibbon worked on it some.

MR. WAGNER: We discussed that, Your Honor.

THE COURT: Well, discussed it, I thought we agreed on it.

MR. GIBBON: Yes, we did.

THE COURT: Let the record show we passed it to Mr. Wagner to look at it and—

MR. WAGNER: Your Honor, that discussion took place with the understanding that our requested instruction would be refused and I could be able to preserve my record on it. Now, there was no agreement that that instruction should be given. The agreement was that as to the form, if my instruction was not going to be given, we discussed the instruction that the Court wanted to give. Now the problem with the instruction, you will recall, Your Honor, I initially objected because that instruction specifically named Sam Scully and Ricky Quinton. Okay. I requested that no such instruction [1421] be given at that time and then the Court suggested that we modify it to make it general. So we worked on that language. At that time the Court also informed me that he had—that the Court had decided to sustain our demurrer.

THE COURT: What was your recollection of the agreement, Mr. Parks?

MR. PARKS: With regard to Instruction No. 11, I remember the Court drafting it and handing it to myself, Mr. Wagner and Mr. Gibbon and asking if we all agreed to it, and all of us, including Mr. Wagner, agreed to it.

THE COURT: Mr. Gibbon, what was your understanding?

MR. GIBBON: Basically, and I think Mr. Wagner, if he will think back, will remember this is the instruction, at least that I remember, the Court first was going

to write it out and name the parties, Mr. Scully and Mr. —the engineer, and counsel, Mr. Wagner, spoke up and we all did, and discussed the fact let's just say employees rather than—you know, naming the employees individually and enumerated in that manner. And as I remember it, John, we did read that over and say yes, that's the way we want it.

MR. WAGNER: Your Honor, again, and Dick, you weren't here prior to that. There was only Mike Parks and the Judge and I.

MR. GIBBON: Excuse me, I was there when that was done and what I have just said, I was standing in the Judge's [1422] chambers.

MR. SATTERFIELD: Well, in any event, this instruction says that members of the train crew are the agents or employees of the Burlington Northern and that an act or omission of an employee acting within the scope of his authority is an act or omission of the railroad company. Now, that's improper unless the Court tells the jury that Sam Scully's negligence, if any, or that Sam Scully was not negligent as a matter of law and that they shouldn't consider any of these acts. That wasn't done, it wasn't made clear.

MR. PARKS. That was not the intention of the Court's ruling, but we'll get to that when we talk about the removal.

THE COURT: This was all discussed this morning, and Mr. Satterfield, you were not there when it was done.

MR. SATTERFIELD: That is correct, Your Honor, I was not.

THE COURT: Whatever the reason, just make your record. Let's go on, because we won't settle anything. The Instructions have been given. Just make your statements.

MR. WAGNER: I agree, Your Honor. Again, as to that particular Instruction No. 11, I further object because it was my understanding at the time that the Court would also give an instruction, having sustained our de-

murrer, to the effect that the jury could not bring back any finding of negligence against Mr. Scully.

[1423] Okay. Now as to No. 12.

THE COURT: Wait just a minute. The Court will note that you were talking about those problems and we were discussing it and I said, "Well, if you think there is a problem, I'll just go ahead and submit the issue of the negligence of Sam Scully to the jury. You can have it either way you want it."

MR. WAGNER: Right, Your Honor.

THE COURT: And at that point—just as a general statement in the record, and if counsel—I'd like for counsel to make their—the gist of what they recall from it.

The Court recalls that the general gist of this was that there would be an agreement that Sam Scully would not be submitted to the jury and that this No. 11 would be given. Now, I did, like from Mr. Parks, if you will—and I didn't sustain any demurrer until we came out here after we talked about all these Instructions. Even yesterday at the close of the evidence and close of the case, it was overruled.

MR. SATTERFIELD: That's correct.

THE COURT: So if you will, the attorneys, if they will, whatever their recollection is.

MR. PARKS: Well, I'd just like to state, first of all, that it was my understanding of the Court's intention on ruling on the demurrer of Sam Scully that what the Court wanted to do was to make it simpler for the jury to decide the issue of liability, and the Court noted that any liability of Scully [1424] would be the liability of his employer. And when the Court indicated that it was going to grant the demurrer or sustain it, the Court was not making a finding of Scully's liability as such.

Now, one other thing I'd like to note. The Court granted the demurrer. The Plaintiff did not agree to it, it was an involuntary dismissal. The Court granted it.

MR. SATTERFIELD: We will let the record speak for itself on that score.

MR. WAGNER: My understanding of the Judge's statement was that counsel agreed to it back in chambers.

Judge, that is not my recollection. My recollection was that you indicated that you either had or would sustain the demurrer and if counsel—Mike, do you recall agreeing to that?

MR. PARKS: I did not agree to it.

THE COURT: Whatever it was, Plaintiffs didn't agree to it.

MR. SATTERFIELD: Well, whatever the record shows.

THE COURT: There was no agreement, just that there would be no objections.

MR. GOSSETT: We would not argue it anyway.

THE COURT: And we were working on Instructions to submit so that it would make it clear if that were done. That was my understanding.

MR. SATTERFIELD: Well, we have got that pretty well [1425] covered in the record, I think, after the Court finished reading the Instructions, Your Honor. That will just be whatever it is.

MR. PARKS: The other thing I would like to point out for the record is that the whole purpose of the Court not instructing as to Scully's liability was to make the issue simpler for the jury, and he asked Mr. Wagner in chambers this morning, he said, "John, we can go ahead and submit the issue of Scully's liability to the jury if you want to." And Mr. Wagner said he didn't want to do it. And then they come back with this removal after lunch after they had made that statement to the Court and in my presence.

MR. SATTERFIELD: Let me ask this question, maybe I can understand it. Was it the desire or the understanding of Court and counsel that what you wanted done, if possible, was to remove Sam Scully as a named party and yet have the jury consider any acts of negligence that he might have been guilty of as being the

responsibility of the railroad company, because that's what Instruction 11 says?

MR. PARKS: That was not our desire. The Court stated that he thought it would be simpler if only the liability of the railroad would be submitted, because Scully's liability would be the railroad's liability and we——

MR. GIBBON: I think that this came in the same category as when we were talking and the Court even announced [1426] to the jury, or maybe counsel did in his closing argument, that there was no verdict given to this jury out deliberating now, that shows a percentage of negligence on the part of the Plaintiff, Tank Trucks or their employee, as to the damages to the truck. That we entered into an agreement in there that we would accept that percentage that is shown on the other verdict as being—you know, binding on this. And this was the same—you know, this is what was going on in Judge's chambers today is that the Judge had a heavy responsibility of a numerical large number of possible or probable Instructions to give, and through trying to cooperate on the part of the attorneys, there was discussions had there that has nothing to do with the merits, that has nothing to do with the actual agreement or non-agreement of the parties that Plaintiff sued, and both Plaintiffs in this case sued the Defendant Scully. And the Defendant Scully was placed on the stand by the Plaintiff, Mr. Bell. Cross examination was made of him as an adverse witness. We questioned him and other witnesses as to his responsibility in acts of negligence on his part. So that there was never anything on the part of the Plaintiff in which they ever intended to or ever did give up any rights that they might have against Mr. Scully until we came down into the area of trying to work something in the chambers, and never at that time was there ever any agreement to dismiss him voluntarily on the part of either of these Plaintiffs, but only [1427] worked with the Court and the Court saying that you

were going to sustain the demurrer, and you did sustain, the demurrer at the time after both parties had rested and after we came back this morning. Your first ruling on it last night was that you overruled the demurrer. Then this morning you came back in and sustained it on your own without any agreement on the part of anybody.

MR. SATTERFIELD: Well, the record will show what it will show as to why the demurrer was sustained. In any event, the record will show that the demurrer was sustained and yet the jury was still given an instruction from which they could find that the Defendant Scully's negligence could be the responsibility of the railroad company.

MR. GOSSETT: May the record show that my memory is the same as Mr. Gibbon's and that if we haven't made a record on behalf of the Plaintiff, Charles Bell excepts to the ruling of the Court in that regard because of the removal action now filed by the Defendant contrary to the earlier agreement.

MR. SATTERFIELD: I might state that the Court has lost jurisdiction once the removal was completed, which consists of the filing of the removal petition in Federal Court, the filing of a copy of it in this Court, and the delivery of notices of removal to adverse parties. Jurisdiction was from and after that time vested in the United States District Court for the Northern District of Oklahoma and this [1428] Court is expressly prohibited from proceeding further under the terms of 28 USCA, 1446E until and unless the case is remanded by the Federal Court.

Consequently, anything that happens after 12:30—that has happened since 12:30 p.m. today, at which time the final step completing the removal was made by delivering copies with notice to counsel, anything after that point is a nullity.

MR. GIBBON: Excuse me, I think that the record ought to show that Mr. Grey sure is working awful hard if he believes that. I don't know why he's making all

this record. If I was him—he says he has got to be over at Federal Court. I would have just picked up my bag and left at 12:30 and let Gibbon and Gossett tell the jury what this thing is worth.

MR. SATTERFIELD: If you will recall, Mr. Gibbon, I asked the Court if he wanted me to participate—

THE COURT: Wait just a minute. We're on Instruction 11. My agreement—my understanding was that we circulated No. 11 around and it was in the presence of Mr. Parks and Mr. Wagner and that's what we decided to do. Mr. Gibbon, somebody, if it wasn't even at the suggestion of, someone decided that I had to change the words train crew and there were two or three words that were suggested to be changed before it was agreed that Instruction 11 be given.

MR. GOSSETT: I believe I may have been there for [1429] that because I asked you to add maintenance of way people or something like that.

THE COURT: That's right. Maintenance and right-of-way was added and everybody was working on that instruction and agreed that one should be given.

MR. PARKS: That was my understanding.

MR. WAGNER: Your Honor, subject—and the entire discussion and before we even sat down to talk about it, it was brought up when we should make a record, and the Court indicated that we could make a record after the jury, the case had been submitted to the jury, and at that time we were preserving any objections we may have to any instruction and that we could make a full record at that time. Relying upon the Judge's, Your Honor's words to that effect, was the only reason that it took place. But I participated in any discussions which regard to this particular instruction with the full understanding that I would be able to make my record on it later and object to it later at this time and this place.

• • • •

[1432] MR. PARKS: I'd like to make some comments concerning [1433] the removal. I'll keep it short.

THE COURT: Okay.

MR. PARKS: First of all, the Court did sustain a demurrer. It was not a voluntary dismissal by the Plaintiff. Because it was an involuntary dismissal by the Court of the resident Defendant, the purported removal talked about by Mr. Satterfield and all his comments about the Court losing jurisdiction, are invalid, because the law is clear that you cannot have removal after an involuntary dismissal of the resident.

The other thing I'd like to state is that this morning I talked about this earlier, but I wanted to make it clear for the record, this morning the Court stated in Chambers when myself and Mr. Wagner were present that he could either submit the issue of liability of Scully to the jury or that he could not. And he told Mr. Wagner that if he wanted him to that he would not grant this demurrer and that the issue of liability would be submitted. Mr. Wagner didn't request that and it was on that understanding that the Judge sustained the demurrer. So in the alternative, we would state for the record that these Defendants waived any purported right of removal they would have.

MR. SATTERFIELD: I think that to try to rely on things that are outside the record is outrageous, Your Honor. If you want to rely on something in a lawsuit, you had better [1434] have it in the record.

MR. PARKS: That's why I'm doing this.

MR. SATTERFIELD: And we of course flatly deny—

MR. PARKS: Well, you weren't present when those conversations were had. Mr. Wagner was, he's your attorney, he's your co-counsel. He said those things.

MR. SATTERFIELD: That is correct, and I believe him.

MR. WAGNER: Let me say in this regard, that the Court indicated this morning, with regard to Mr. Scully, asked me if I wanted Mr. Scully in or out of the case,

and I noted to the Court that we had made a demurrer with regard to Mr. Scully. At that point I think the conversation became very vague and the Court indicated that the demurrer would be sustained.

Now, whether or not Plaintiff explicitly agreed to that, I don't recall an explicit agreement. I do not recall an explicit non-agreement at that point in time. I think the record, once we went back out in the courtroom, in that regard, ought to speak for itself.

MR. SATTERFIELD: I was present. I took one look at that instruction and I objected to it, Your Honor, because counsel for Plaintiff were trying to have it both ways. They were trying to eliminate the resident Defendant and at the same time, have his negligence considered by the Jury, and that is the exact impact of the Court's instructions that were given to the Jury.

[1435] THE COURT: I recall it as Mr. Parks recalled it and Mr. Satterfield wasn't present. Mr. Gibbon was some, and he had recollection of it and he objected to it. For whatever it's worth—you know, essentially what ended up happening—is there anything else?

MR. SATTERFIELD: Nothing from us, Your Honor.

MR. PARKS: Nothing from the Plaintiff, Charles Bell.

MR. ALLEN: I want to make one other record. Are you talking about for everything, Judge?

THE COURT: Yeah, or the removal.

MR. ALLEN: No, it's not on the removal.

THE COURT: Anything else on the removal?

MR. ALLEN: I don't have anything on the removal.

THE COURT: Okay. The Court feels in these situations and it's been brought up to the Court by Mr. Satterfield that Mr. Cook is looking at—taking this case on removal, and the Court feels that once we swear a Jury and get started, there is decisions to be made by the Court and by the Jury, and at that point we had jurisdiction to try it regardless of what rulings were made. If not, there are a lot of their railroad cases pending over

here, and we can send them all over to Tulsa to any judge over there that wants to hear them in the federal building, and they'll all be sent over there, if that's what they're inclined to do, is take them after we spend seven days and work on instructions and get them drawn and then counsel [1436] files a Petition for Removal when we're coming back to make closing arguments, after rulings of the Court and evidence has been received, and witnesses sworn, seven days of testimony. The next time when all the other railroad cases—we'll give them to them much earlier, though, so that the federal judges can hear —can spend their seven days hearing them rather than us before we give them to them.

MR. SATTERFIELD: May I respond, Your Honor?

THE COURT: If you want to, go ahead, if you feel you have got to respond to the Court's comments. You said you had said all you need to say on the removal. Is there something that I said that offended you?

MR. SATTERFIELD: No, sir, I wasn't offended and I certainly haven't tried to indicate that I was. I simply wanted to try to make clear to the Court, based on your comments, that the reason a case is not removable when there is diversity of citizenship, is because there is a resident defendant in the case.

THE COURT: Mr. Satterfield, I understand all of that, and there won't be a resident defendant in any of them because they'll all be over at the federal courthouse with Burlington Northern as the sole defendant and the federal judges trying them, in Creek County. Now, do you understand what I'm talking about?

MR. SATTERFIELD: Yes, sir. I've not quite completed my response, but if you—

[1437] THE COURT: I don't know why we have got to go through everything everytime.

MR. SATTERFIELD: That will be fine. That's all I have, Your Honor.

• • • •

[After the verdicts were announced, the following proceedings occurred:]

• • • •

[1449] THE COURT: Okay. If that's the verdict, I'll order the—both verdicts received and filed of record in the case. And ladies and gentlemen, if the question comes up, you can talk to anybody that you want to about the verdicts that you have rendered. Discuss it, feel free to if you want to. If you don't want to talk about it, you should be able to state that opinion. If anyone bothers you about it, you let the Court know if you don't want to talk about it, and we'll take care of it. I appreciate you for your service. It's been seven long days and believe me you won't be called back. If you are, you just let me know for any reason, okay? Appreciate it. Thank you very much.

MR. GIBBON: For the purpose of the record, comes now the Plaintiff, Tank Trucks, Incorporated, and moves the Court to assess attorneys fees in this matter and ask the Court to allow us to file a motion and put on evidence at a later day.

[1450] MR. GOSSETT: Plaintiff, Charles Bell—No, I'm sorry. I withdraw it.

(WHEREUPON, the proceedings were concluded.)

REPLY BRIEF

No. 86-1475

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

CHARLES O. BELL, JR. and TANK TRUCKS, INC.,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

---

REPLY BRIEF FOR PETITIONER

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BURLINGTON NORTHERN RAILROAD COMPANY,
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REPLY BRIEF FOR PETITIONER

Review of the decision of the Oklahoma Court of Appeals is required because it disregards the explicit command of the federal removal statute that once a case is removed from state to federal court the former "shall proceed no further unless and until the case is remanded," and injects confusion into a previously well-settled area of the law where certainty is of paramount importance.[1] The need for review is underscored by the confusion apparent in respondents' brief.

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[1] The statute, 28 U.S.C. § 1446 (1982) ("section 1446"), is reproduced at Pet. App. 22a-24a. The specific textual reference is to § 1446(e).

In opposing review of the decision below, respondents stake out two positions that are fundamentally opposed. First, they argue—in the face of near unanimous authority to the contrary—that the rule of *Metropolitan Casualty Insurance Co. v. Stevens*, 312 U.S. 563 (1941), which permitted a state court to "proceed at its peril" after removal, survives the subsequent enactment of section 1446. Opp. at 6-7. Second, respondents contend that further review of the Oklahoma decision would be inappropriate because it is *sui generis*, in that virtually all other courts that have addressed the question have reached the opposite conclusion. Opp. at 14.

If respondents' first argument were sound, then literally dozens of state and federal courts must have misconstrued section 1446(e) since its passage in 1948. If, on the other hand, the decision below is inconsistent with the command of the present statute, then it constitutes a dangerous departure from existing law, inviting duplicative state and federal proceedings and state court activity in excess of jurisdiction. The resultant potential for confusion is well demonstrated by respondents' brief itself, which articulates no less than four versions of the *Metropolitan* rule. *See infra* at 3-4. This confirms the need for review by this Court: the effect of a removal to federal court on further state court proceedings must be a matter of uniform nationwide applicability, not one permitted to depend on local preferences.

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1. Respondents valiantly assert that the pre-1948 *Metropolitan* decision remains the "authoritative" rule even today, and attempt to distinguish the precise facts of the case at bar from the many others decided under section 1446(e). This exercise, however, misses the for-

est for the trees. The basic point, never answered directly by respondents, is that *existing authority is overwhelmingly to the effect that any substantial proceedings in state court, after removal but before remand, are absolutely void. See* cases and commentaries cited, Pet. at 10-13. Indeed, respondents recite, and do not contest, petitioner's observation that with the "possible exception of one 1975 decision of the Florida Supreme Court, 'there is *not one* other decision, state or federal, upholding under section 1446(e) the validity of substantial state court proceedings taken after removal and prior to remand.'" Opp. at 14 (quoting in part Pet. at 14) (emphasis in original).[2] Thus, the near-universal understanding throughout the state and federal judicial systems, relied upon on a daily basis as the law of removal, is that the *Metropolitan* "proceed at peril" rule was revoked by the 1948 amendments to the federal removal statutes.

2. The confusion inherent in any piecemeal retreat from the bright-line, literal "proceed no further" rule is well illustrated by respondents' brief. In attempting to reconcile their reliance on *Metropolitan* with the law of the last forty years, respondents articulate at least four versions of what the current law is, or should be, as applied to the facts of this case. In succession, these positions appear as follows: (1) the 1948 amendments made no change in the "proceed at peril" rule of *Metropolitan*, Opp. at 6-10; (2) any legislative modification of *Metropolitan* extended only to "orders, decrees, judgments, convictions, or similar determinative actions by the state court" after removal, Opp. at 11; (3) any statutory change effected to *Metropolitan* cannot be applied to "an ongoing jury trial," Opp. at 13; and (4) even if

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[2] It is perhaps instructive that respondents do not cite *even one* of the post-1948 cases relied upon by the Oklahoma Court of Appeals.

section 1446 overruled *Metropolitan*, the state court retains authority to complete "the last few hours of a lengthy jury trial." Opp. at 11.

This menu of legal standards, ranging from a broad categorical statement to a narrow standard tailored to the facts and circumstances of the case at bar, begs the question just what the "rule" is supposed to be. Should the decision below be permitted to stand in the face of existing precedent, hundreds of state and federal courts, and thousands of litigants, will be left asking themselves that very question. Rather than permitting such a doubtful situation to exist, this Court should render a definitive statement on the subject.

3. Each of respondents' various attempts to qualify the "proceed no further" rule is seriously defective, when judged against the language and purposes of section 1446. First, as petitioner has demonstrated, the 1948 amendments were designed to simplify the removal process, and thus by effect, to revoke the "proceed at peril" rule and the regime of parallel and duplicative proceedings that it permitted. Pet. at 9-11. Numerous courts have so understood the effect of the 1948 legislation. Pet. at 10-13. The leading treatises, the American Law Institute, and the Advisory Committee of the Judicial Conference have all reached the same interpretation. Pet. at 13, 18-19 & nn.20-21. Thus, the pre-1948 *Metropolitan* case is far from today's "authoritative decision" in this field.

Second, respondents' attempted distinction of orders, decrees, and judgments from other substantial post-removal proceedings is specious, in light of the categorical command of section 1446(e) to "proceed no further." In the context of a personal injury action tried to a jury, there can hardly be anything more determinative than the culmination of the trial—final instructions to the

jury, concluding arguments, jury deliberations, and the rendering of verdicts. These events require the presence and active participation of counsel for the parties.[3] Once allowed to occur, such proceedings are more difficult to undo, and more likely to provide a disincentive to appropriate action by a federal court, than the simple entry of orders.

Finally, the argument that the "proceed no further" rule should be relaxed to avoid the "disruption" that may result when removal occurs during trial is merely an invitation to judicial revision of the statute.[4] Section 1446 is simply not open to a construction differentiating between pre-trial and in-trial removal in civil cases. In fact, legislation has been proposed that would have amended section 1446 with this precise effect, but Congress has chosen not to enact such a revision. Pet. at 18-19 & n.20.[5] Thus, the last two solutions proposed by respondents would carve out an exception to section 1446(e) that Congress has declined to enact. The case law suggests a sound basis for Congress' refusal to draw such a distinction. Under certain circumstances, the grounds for removal do not emerge until trial itself. A classic example is the voluntary dismissal of a resident

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[3] Respondents' suggestion, Opp. at 17, that a defendant who is "certain that the case is properly removable" could simply decide not to "devote substantial resources" to any proceedings ordered by the state court after removal, is an invitation to chaos.

[4] Some "disruption" is inherent in any procedure permitting removal or transfer of a case from one court to another, regardless of the time of removal, and Congress has nevertheless chosen for policy reasons to permit removal from state to federal court on specified grounds.

[5] In addition, there are many specialized federal removal statutes that permit removal of a civil action only before trial. *See, e.g.*, 9 U.S.C. § 205 (1982); 12 U.S.C. § 632 (1982); 22 U.S.C. § 283f (1982).

defendant late in a trial, thereby creating complete diversity; the option of removal is needed in this situation to counter a potentially abusive tactic by plaintiffs. *See Heniford v. American Motors Sales Corp.*, 471 F.Supp. 328 (D.S.C. 1979) (involving facts almost identical to this case), *dismissed mem.*, 622 F.2d 584 (4th Cir. 1980).

4. Respondents repeatedly assert that Burlington Northern's petition for removal was "baseless." Opp. at i, 1, 15 & n.14. This contention is not only inaccurate,[6] but also irrelevant to the petition before this Court. Under the federal statute, it is not the role of state courts to pass on the merits of removal petitions, for "deterrence" purposes or otherwise. *See* Opp. at 15-16. Unless respondents are correct that the *Metropolitan* rule survives to grant the state court discretion to proceed, then their characterization of the record is immaterial to whether the state court should have suspended its trial upon removal of the case.[7]

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[6] As petitioner has previously recounted in detail, its removal on grounds of diversity was based on the dismissal of the resident defendant from the case, which occurred with plaintiff's counsel stating *unmistakably four times* that he had "no objection to the demurrer being sustained." Pet. at 3-4 & n.1; Pet. App. 45a-46a. Respondents now concede, somewhat coyly, that they "acquiesced in the dismissal," Opp. at 3-4, but nevertheless continue to maintain that the dismissal was not "voluntary"—relying only on statements made *after* the case had been removed, and the state court's jurisdiction had been suspended. *See* Opp. at 15 n.14; Opp. App. 7a. In any event, the trial court record was sufficiently ambiguous that the federal court found it necessary to address the removal issues at length, and ultimately remanded the case only because of its "doubt as to whether this action was properly removed." Pet. App. 40a.

[7] Respondents also suggest the inadequacy of the record in this case as a vehicle for review. Opp. at n.15. The question presented for review, however, is not the *removability* of the case upon the trial court record—the matter allegedly obscured—but instead the effect of the removal on the state court's authority to proceed. The record is crystal clear as to when the removal petition was filed, when the state court was advised of it, and how that court reacted to it.

5. Respondents also argue that the state court had "no choice but to declare a mistrial," had it not proceeded to closing arguments, jury deliberation, and verdicts. Opp. at 15; *see* Opp. at i, 6, 13 & n.12. No authority whatever is cited for the artificial proposition that a retrial would have been required, merely because of a suspension of the state court trial pending federal court action upon the removal petition. It would not have been difficult to send the jury home for the afternoon to await the outcome of the removal proceedings in federal court. Had the state court stayed its proceedings, and had respondents moved immediately to remand, noting the pendency of the jury trial in state court, the federal court might well have acted very swiftly.[8] Upon remand, the trial could then have been resumed immediately, and the case decided by the previously impanelled jury.

Only because the state court chose improperly to proceed, will reversal of the decision below now require "void[ing] not merely the so-called 'interim proceedings'—the closing arguments and jury deliberations—but the entire trial that preceded the removal petition." Opp. at

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[8] *See, e.g., Wilson v. Sandstrom*, 317 So. 2d 732, 741 (Fla. 1975) (case remanded "within hours" after removal), *cert. denied*, 423 U.S. 1053 (1976).

Here, respondents did not even file a motion for remand until four weeks after the case had been removed. By that time, the trial had been completed and the jury had rendered its verdicts, and and there was no reason for the federal court to expedite its decision.

13 (footnote omitted). The present posture of the case simply underscores the waste of resources inherent in the actions of the state trial court. Had the state court heeded the command of section 1446(e) to "proceed no further," there would have been no need to invalidate *any* of its proceedings. Thus, the practical arguments for adherence to the "proceed no further" rule are *strongest* when removal occurs during trial.

6. Respondents downplay the potential for mischief created by the decision below, arguing that what occurred in the state trial court was a "rare" turn of events. Opp. at 14-15. This argument is doubly at fault. First, even in the current state of the law, the failure of state courts to obey strictly the command of section 1446(e) is not as rare as respondents might suggest. Indeed, in virtually all of the cases cited by both parties to this Court, the state court had proceeded in some fashion in the face of a removal. *See* Pet. at 10-13. Second, the decision below, if not reversed, can only serve to encourage state courts to experiment more extensively with departures from the statute's "proceed no further" rule. Given the demonstrable tendency of some state courts to cling to their jurisdiction,[9] momentum could gather quickly, breaking away from the sound and well-settled standard now observed by the vast majority of courts.

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[9] In this case, the Oklahoma trial judge stated:

> [T]aking this case on removal, . . . the Court feels that once we swear a Jury and get started, there is [sic] decisions to be made by the Court and by the Jury, and at that point we had jurisdiction to try it regardless of what rulings were made.

Opp. App. 12a. There is nothing in the record below to suggest that once the case was removed, the state trial court even *considered* either the substantive removability of the case, or matters bearing on judicial economy, before proceeding to verdicts.

In the long run, because the validity of a removal will often appear in a different light to the federal court whose job it is to decide the question than to the state court which has lost jurisdiction of the case, permitting the latter discretion to proceed will *inevitably* waste a considerable portion of those judicial resources committed to post-removal proceedings. Even a small margin of error by state courts in anticipating the decisions of federal courts will result in substantial waste; in a given year, nearly twenty thousand civil cases are removed from state to federal court.[10] Thus, for instance, if state courts were to anticipate remand and proceed in only *one percent* more cases than are actually remanded by the federal courts, then nearly *two hundred sets of proceedings each year* would require invalidation. The potential of the "proceed at peril" rule to generate such systemic waste dwarfs the seven days of trial that must be undone below, in order to enforce rigorously the mandate of section 1446(e).

7. As demonstrated in the Petition for Certiorari, the greatest need in this area is for a bright-line rule that will announce to litigants and courts exactly where jurisdiction lies at any given time. In section 1446(e), Congress has provided such a rule, and heretofore, the courts have interpreted and enforced the statute accordingly. If a change is to be wrought, that should be accomplished by Congress in a uniform nationwide manner, rather than on an *ad hoc* basis according to the views of various state and federal courts.

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[10] *Annual Report of the Director of the Administrative Office of the United States Courts*: Table 17, "U.S. District Courts: Civil Filings by Origin During the Twelve Month Period Ended June 30, 1977 through 1986" (1986). The exact number of civil removals from July 1, 1985 to June 30, 1986 was 19,680, or 7.7% of total federal district court civil filings. *Id.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals of the State of Oklahoma, and that order and judgment should be summarily reversed.

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May 18, 1987

OPINION

SUPREME COURT OF THE UNITED STATES

BURLINGTON NORTHERN RAILROAD COMPANY *v.* CHARLES O. BELL, JR., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OKLAHOMA, FOURTH DIVISION

No. 86-1475. Decided June 8, 1987

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the question whether a state court may proceed to adjudicate a case after a removal petition has been filed in federal court. The respondents in this case brought a negligence action against the petitioner and an individual defendant in state court. After seven days of trial, the trial court dismissed the individual defendant. Petitioner then filed a removal petition in federal court, alleging diversity of citizenship. The state trial court proceeded despite the removal petition and the jury rendered a verdict against petitioner. Subsequently, the District Court held that the case was not properly removed because the individual defendant was dismissed on the merits and not, as petitioner contended, with the consent of the plaintiffs. The District Court remanded the case and the state trial court entered judgment against petitioner on the basis of the previously rendered jury verdict.

The trial court and the Oklahoma Court of Appeals rejected petitioner's argument that the verdict against it is void under 28 U. S. C. § 1446(e), which provides that the proper filing of a removal petition "shall effect the removal [to federal court] and the State court shall proceed no further unless and until the case is remanded."

The decision below conflicts with cases holding that when a case has been removed to federal court the state court lacks jurisdiction to act until the case is remanded. See, *e. g.*, *South Carolina* v. *Moore*, 447 F. 2d 1067, 1072–1074 (CA4 1971); *Mississippi Power Co.* v. *Luter*, 336 So. 2d 753, 755

(Miss. 1976). I would grant certiorari to resolve this conflict.